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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 295. 84.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED APRIL 25, 1901.

(18,133.)

10936

(18,133.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 305.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Pleas before the supreme court of Iowa in a cause therein tried and determined wherein Jane Johnson was plaintiff and appellant and The New York Life Insurance Company defendant and appellee.

Be it remembered that on the 11th day of January 1898, there was filed in the supreme court of Iowa, a printed abstract of record, the same being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, January Term, 1898.

JANE JOHNSON, Plaintiff, Appellant,
vs.
THE NEW YORK LIFE INSURANCE CO., Defendant, Appellee.

Appeal from Pottawattamie county district court, Hon. W. R. Green, judge

John P. Breen, attorney for appellant.
James H. McIntosh, attorney for appellee.

Appellant's Abstract of Record.

The plaintiff filed in the clerk's office of the district court of Iowa, in and for Pottawattamie county, on the 19th day of November, 1897, her amended and substituted petition, duly verified, in words and figures as follows:

Petition (Omitting Title of Court and Case.)

2 The plaintiff files this her amended and substituted petition, and says, for cause of action against the defendant, a corporation chartered and organized under the laws of the State of New York; that upon the 27th day of December, 1890, the said defendant made, executed and delivered to Frank C. Johnson, her husband, a policy or contract of life insurance, in the following words and figures, to wit:

Number 385,048. Amount, $25,000.00.

Age 44—Annual premium $1060.00—Notice: In consideration of the stipulations in case of lapse specified in the policy, the provisions of chap. 347, of the Laws of 1879, of the State of New York have been waived in the application for this policy.—The New York Life Insurance Company, by this policy of insurance, "in consideration, of the agreements, statements, representations and warranties submitted to its officers at the home office, in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of fourteen hundred and fifty-five dollars and — cents, to them in hand paid, at the office of the company in the city of New York, (being the premium for two years' term insurance),

and of the annual payment of one thousand and sixty dollars and — cents, (being the life premium), to be paid at said office on or before the eleventh day of November, in every year during the continuance of this policy, commencing on the eleventh day of November, 1892.

"Doth insure the life of Frank C. Johnson (banking), of Randolph, in the county of Fremont, State of Iowa, (hereinafter called the insured), in the amount of twenty-five thousand dollars, commencing on the eleventh day of November, 1890, at noon.

"And the said company doth hereby promise and agree, to pay the amount of the said insurance, at its office in the city of New York, to the insured's executors, administrators or assigns, upon receipt and approval of proofs, as hereinafter required, of the death, during the continuance of this policy, of the said insured, deducting therefrom all indebtedness to the company, together with any balance of the year's premium remaining unpaid.

3 "This policy is issued and accepted upon the following express conditions and agreements:

"First. If this policy shall become a claim by death after having been in force two full years, the company will not contest its payment on account of the incorrectness of any statement in the application, or in the accompanying declarations to the medical examiner (except in case of fraud), provided, however, that if the age of the insured is understated, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

"Second. That if any one of the premiums is not paid as hereinafter provided, on or before the day when due, then this policy shall become void, and all payments previously made, shall remain the property of the company, except that if this policy shall lapse, or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums, as above specified (that is to say, the premiums for four years of insurance) a paid-up policy will be issued, on demand made, within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums, but without participation in profits (and without mortuary dividend) for such an amount as the net reserve on this policy at the time of lapse computed by the American table of mortality, and interest at four and one-half per cent. after deducting all indebtedness to the company will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse; and all right to any other paid-up policy or surrender value, provided for by the statute or any State or country, is hereby waived.

Examined. Combination term and life. Distribution policy. Mortuary dividend.

"Third. That the provisions, requirements and benefits printed or written by the company upon the next page of this policy are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

"In witness whereof, the said New York Life Insurance Company, has, by its president and vice-president or actuary, signed and delivered this contract, this twenty-seventh day of December, one thousand eight hundred and ninety.

"RUFUS W. WEEKS, *Actuary.*
"WM. W. BEERS, *President.*"

4 That upon the back, or inside page of said policy appears the following:

Provisions, Requirements, and Benefits Referred to in this Policy.

Distribution-policy provisions.—"This policy is issued on the distribution-policy plan, the particulars of which are as follows:"

"That the distribution period for this policy shall be completed on the eleventh day of November, in the year nineteen hundred and ten.

"That no dividend of surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force.

"That surplus or profits derived from such policies on the distribution-policy plan as shall not be in force at the date of the completion of their respective distribution periods, shall be apportioned among such policies as shall complete their distribution periods.

"That after the completion of the distribution period, provided this policy shall not have been previously terminated, this policy shall secure to the insured one of the following benefits:—

"First. To apply the accumulated surplus apportioned by the company to this policy to the purchase of an annuity on the life of the insured, to be used in reduction of subsequent premiums on this policy, and in case the amount accruing in any year from the annuity shall exceed the amount of premium due thereon the excess to be paid in cash.

"Second. To continue the policy for the original amount and withdraw in cash the accumulated surplus apportioned by the company to this policy.

"Third. To withdraw in case the entire equity (that is, the net reserve, being ten thousand five hundred and seventy dollars and 50 cents ($10,570.50), and in addition thereto the accumulated surplus aforesaid.)

5 "Fourth. To convert the entire equity into a paid-up policy without participation in profits, for an amount to be determined by the method then in use by the company in determining paid-up policies of this class; provided that this policy is legally surrendered during the lifetime of the insured, and within ninety days from the completion of the distribution period, and provided further that no paid-up policy shall be issued for any amount in excess of the original insurance, except upon a medical re-examination satisfactory to the company.

"Fifth. The conversion of the entire equity into a life annuity upon the life of and payable to the insured.

"Sixth. To continue the policy for the original amount and convert the apportioned surplus into a reversionary addition conditioned upon satisfactory re-examination.

"These benefits are at the option of the insured; but it is understood and agreed that, not less than three months prior to the completion of the distribution period, the said insured shall notify the company, in writing, which benefit is selected; and that if no such notification shall be received, then and in that case, the surplus apportioned to this policy shall be applied to the purchase of an annuity as stipulated in the 'first benefit' named above.

"That in the payment of premiums upon this policy, falling due within the selected distribution period, a grace shall be allowed of one month; provided that in all cases when this grace is availed of, interest at the rate of six per cent. per annum shall be paid to the company for the time deferred."

Dividends after distribution period.—"If this policy is continued in force after the distribution period, surplus will be apportioned to it at the expiration of each period of five years thereafter. Such apportionments will be made in the form of reversionary additions; but the value of the same may, at the option of the insured, be taken in cash, or applied to the reduction of premiums during the next five-year period, or to the permanent reduction of all future premiums. When the value is taken in cash, payment shall be made to the insured, and his receipt shall be a valid release to the company."

"Should the insured, however, request in writing that
6 dividends after the distribution period be declared annually instead of at intervals of five years, the change so requested will be made, dating from the completion of the distribution period, or of any five-year period thereafter."

Surrenders after distribution period.—"This policy, if in force, may be surrendered to the company at the expiration of any period of five years after the distribution period, upon thirty days' previous written notice. If so surrendered the entire reserve, at American four per cent., and in addition thereto the surplus then apportioned, will be allowed as a surrender value."

Premium loans.—"After the premiums have been paid on this policy for —— ten —— years, the company will loan to the holder of the policy (to enable him to continue it in force,) the amount of any subsequent premium or premiums within the distribution period, as the same shall become due; provided interest at the rate of six per cent. per annum is paid annually in advance upon all such loans. The aggregate amount of any such loans, and all interest accrued or unpaid upon the same shall be deducted from the proceeds of this policy in any settlement of the policy or of any benefits thereunder."

Mortuary dividend.—"If this policy shall become a claim by death occurring within the distribution period above specified, and subsequent to the eleventh day of November, in the year nineteen hundred —— a mortuary dividend will be paid therewith, equal to the total amount of premiums (at the tabular annual rate) due on or

after said date and paid, whether in cash or by premium loan, as above."

Risks not assumed.—"This policy does not insure against death occurring while engaged in military or naval service in time of war or in consequence of such service, nor against death in consequence of a duel or violation of law. In any such case the policy shall be null and void; but on its surrender within six months thereafter, with satisfactory proofs of death, the net reserve (computed by the American table of mortality and interest at four and one-half per cent.), after deducting all indebtedness to the company, will be paid therefor."

Powers of agents.—"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to
7 issue a permit for residence, travel or occupation, or to bind the company by making any promise or receiving any representation or information. This power can be exercised only by the president, vice-president, or actuary of the company, and will not be delegated.

Payment of premiums—Notice when due.—"All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president or actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice, or the acceptance of any premium after it is due, is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due.

Proofs of death.—"Proofs of death under this policy shall be furnished to the company at its office in the city of New York, within one year after death, and shall include sworn statements on the company's forms, as follows: (1) A statement from each claimant; (2) a statement from each physician who attended the deceased within a year before death; (3) a statement from a responsible householder who knew the deceased; (4) a statement from the undertaker; (5) a statement from the clergyman, whenever one officiates; (6) a copy of the verdict and of the evidence on which it is based, duly certified, whenever an inquest has been held. All questions must be fully answered, and the omission of any of the answers or statements required must be satisfactorily explained or supplied by other proofs.

Assignments.—"Any assignment of this policy must be made in duplicate, and both copies must be sent to the home office for acknowledgment, one of them to be retained by the company. Under no circumstances will the company assume any responsibility for the validity of any assignment."

That in the application for said policy, made to the defendant

company, the original of which is now in the possession of
8 defendant, and a purported copy of which, made by the defendant company, is attached to the policy, it is stated and mutually agreed, that the contract of insurance, issued upon said application, should be governed by the laws of the State of New York.

And plaintiff alleges, as a matter of fact, that said policy was signed and issued at the home office of said company in the city of New York, but was negotiated for through the office of the defendant company in the city of Council Bluffs, Pottawattamie county, Iowa, and delivered to the said Frank C. Johnson through that office.

That the statutes of the State of New York, in force when said policy issued, relating to life insurance companies chartered under the laws of that State, provides, among other provisions pertaining to the subject, as follows:

"No life insurance company, doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall
be taken to be in full compliance with the requirements of
9 the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"Provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

That the above-quoted extract from the laws of New York is designated as section 1, of chapter 321 of the Laws of 1877, passed at the 100th session of the legislature of New York, and thereafter codi-

fied in the successive editions of the "Revised Statutes of New York," and is found in "eighth edition of the Revised Statutes of New York," edited by Montgomery H. Throop, in 1889, and published by Banks Bros., law-book publishers of New York city, at pages 1685–'6 thereof.

That according to the laws of the State of New York embodied in opinions of the courts of that State, at the time said policy issued, the aforesaid provisions of the statute of 1877 above copied, could not be waived by the insured; that any provision of the policy in suit waiving or attempting to waive the sending of the notice required by the above-quoted statute, was and is contrary to law and moreover was not within the intent of the parties when the policy in suit was applied for and contracted for and was also without consideration;

That in 1895, the said Frank C. Johnson duly assigned and transferred said policy of insurance to this plaintiff and she is still the owner thereof; that upon the 28th day of September, 1896, the said Frank C. Johnson died in the city of Omaha, Nebraska, and that thereafter this plaintiff made formal proofs of his death to the defendant company, as by said policy required, and demanded payment of the amount due thereunder; that said Frank C. Johnson and this plaintiff, his assignee, performed and offered to perform all provisions and conditions of said insurance contract, required to be performed by them, or either of them, but that notwithstanding this the defendant refused, and still refuses performance and payment on its part; that there is due plaintiff upon said policy the full amount thereof, to wit, $25,000, with interest thereon at 6 per cent. per annum from January 1st, 1897.

Wherefore, judgment is prayed against the defendant company for said sum of twenty-five thousand dollars, with interest at six per cent. thereon from January 1st, 1897, and for costs of this action.

JOHN P. BREEN,
Attorney for Plaintiff.

On the 27th day of November, 1897, the defendant filed its duly verified answer in words and figures (omitting formal parts) as follows:

Answer.

Now comes the defendant, New York Life Insurance Company, and makes this its answer to the amended and substituted petition of the plaintiff, Jane Johnson, and says for its

First Defence.

That said defendant admits that it is a corporation chartered and organized under the laws of the State of New York, and avers that it is incorporated as a life insurance company; and further says that said defendant does not now keep or maintain, nor has it ever kept or maintained, in said Pottawattamie county, either an office or an agency or its principal place of business, nor does it now reside, nor

has it ever resided in said county; denies that the pretended
11 policy of insurance, purporting to be set out in the plaintiff's petition, was negotiated for through the office of said defendant, in the city of Council Bluffs, in Pottawattamie county, Iowa; denies that said pretended policy was delivered to the said Frank C. Johnson through the office of said defendant in the city of Council Bluffs, Pottawattamie county, in the State of Iowa; avers that no contract of insurance was ever negotiated for, or made, or delivered to, the said Frank C. Johnson in Pottawattamie county, Iowa, and further avers that the said Frank C. Johnson, referred to in the plaintiff's petition, died in Douglas county, in the State of Nebraska, and that no loss insured against by this defendant in favor of the said deceased, or his assigns, or other liability whatsoever, on account of an insurance contract, ever occurred in Pottawattamie county, Iowa.

Second Defence.

That the said defendant denies each and every allegation in the plaintiff's amended and substituted petition contained, except that it admits that it is a corporation, organized and existing, under and by virtue of the laws of the State of New York.

Third Defence.

1. This defendant, further answering, says for its third defence, to said amended and substituted petition, that it admits its corporate existence, as averred in the plaintiff's petition, and that it made and delivered to the said Frank C. Johnson, on or about the 27th day of December, 1890, a policy of insurance, numbered 385048, in words and figures substantially as that part of the plaintiff's amended and substituted petition purporting to be a copy thereof, except that there was included in said policy a copy of the said Johnson's application for the same, and of his declarations made to the defendant's medical examiner.

2. Defendant further says that the said Johnson paid the
12 premium on said policy to the 11th day of November, 1893, and no more and that he wholly failed, neglected, and refused to pay that premium that became due and payable on the 11th day of November, 1893, or any part thereof, or any subsequent premium, and that no premium whatever, or any part thereof, has been paid upon said policy since the payment of that premium that matured on the 11th day of November, 1892.

3. That the said Johnson duly made request of this defendant in writing that it extend the benefits of its accumulation-policy plan to his said policy No. 385048, a copy of which said request is hereto attached, marked Exhibit "A;" that pursuant to said written request and on or about the 20th day of January, 1893, this defendant duly made, executed, and delivered, to the said Johnson its certificate and agreement in writing, thereby extending to him, as the legal owner of said policy No. 385048, the benefits of the accumulation-policy plan of said defendant, as in said accumulation certificate

stated; that a copy of said accumulation certificate and agreement is hereto attached, marked Exhibit "B."

4. That by the terms and conditions of said policy, as modified by said accumulation certificate, it was agreed by and between the said Johnson and this defendant, that in consideration of the payment of the premiums on said policy to the 11th day of November, 1893, and for the purpose of enabling the said Johnson to relieve himself from the immediate consequences as provided in said original contract of the non-payment of the premium that became due and payable on the 11th day of November, 1893, the said insurance would be extended for the face amount of said policy to the 11th day of May, 1896, or on demand made within six months after the said 11th day of November, 1893, with the surrender of said policy, paid-up insurance would be issued to the said insured for the sum of
13 $1,825.00, or that said policy would be reinstated within said six months, upon payment of said overdue premium, with interest thereon at the rate of five per cent. per annum.

5. The defendant further says that the said Johnson never made any demand upon this defendant for said paid-up insurance, and never paid said overdue premium, or any part thereof, and that by reason of his failure in the premises that one of said benefits by which, in consideration of the payment of the premium on said policy to November 11th, 1893, the said insurance for $25,000 on his life would be extended to May 11th, 1896, thereby became operative, and said insurance was extended for the face amount of said policy to the said 11th day of May, 1896, and that on said last-named day said policy expired by limitation.

6. The defendant, further answering, denies each and every allegation in said amended and substituted petition contained, not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied.

Fourth Defence.

For a further and fourth defence to the said plaintiff's amended and substituted petition, the said defendant says:

1. That it admits that it is a corporation, chartered and organized under the laws of the State of New York, and avers that it is incorporated for the purpose of doing a life-insurance business.

2. The defendant further admits that it made and delivered to the said Frank C. Johnson, on or about the 27th day of December, 1890, a policy of insurance numbered 385048, in words and figures substantially as that part of the plaintiff's amended and substituted petition purporting to be a copy thereof, except that there
14 was attached to said policy a copy of the said Johnson's application for the same, and of his declarations made to the defendant's medical examiner.

3. Defendant admits that in the application for said policy it was mutually agreed that the contract of insurance issued upon said application should be governed by the laws of the State of New York; and avers that it was further agreed in said application that

the contract contained in said policy, and in said application, should be construed according to the laws of the State of New York, and that the place of said contract was, and should be the home office of said defendant, in the city of New York, in the State of New York.

4. The defendant further admits that said policy was signed and issued at the said home office of the company in the city of New York, but denies that the same was negotiated for by the defendant company in the city of Council Bluffs, Pottawattamie county, Iowa, and denies that said policy was delivered to said Frank C. Johnson through the office of said company in the city of Council Bluffs, Pottawattamie county, Iowa, and denies that said defendant company ever had an office in said Pottawattamie county, Iowa.

5. The defendant admits that at the time said policy was issued there was then existing and in force in the State of New York a statute relating to life insurance companies, of which that part of the plaintiff's amended and substituted petition purporting to give section 1 thereof forms a part; but the defendant avers that it is further provided by section 2 of said statute that

"The affidavit of any officer, clerk, or agent of the company, that the notice to the assured provided for in section 1 has been duly addressed and mailed by the company issuing such policy to the insured, shall be presumptive evidence of such notice having been duly given."

And the defendant avers that said section 1 and section 2
15 are the whole of said statute; that said statute in a form differing somewhat from that contained in said amended and substituted petition was originally passed in the year 1876, and constituted, and was known as chapter 341 of the Laws of 1876, passed at the 99th session of the legislature of the State of New York, being an act entitled "An act relating to the forfeiture of life-insurance policies," and that said act, section 1 of which is set out in the plaintiff's amended and substituted petition, and section 2 of which is hereinbefore set out, constituted said chapter 341 of the Laws of 1876, as amended by an act passed in the year 1877, by the 100th session of the legislature of the State of New York, and known in the proceedings of said legislature, of said year 1877, as chapter 321.

6. The defendant further says that the court of last resort in the State of New York is, and at all times herein mentioned was that court called the court of "appeals;" that on to wit, the 30th day of April, 1888, there was pending before said court of appeals of the State of New York a cause entitled "*Thomas M. Carter, respondent v. Brooklyn Life Insurance Company, appellant;* that said action was brought to compel the said Brooklyn Life Insurance Company to accept a payment of pre-ium upon a policy of insurance issued by it, upon the life of the said Thomas M. Carter, plaintiff, and to reinstate said policy, which said insurance company had declared to be forfeited; that in the year 1870, the said insurance company issued and delivered to the said Carter an insurance policy upon his life for $5,000, in consideration of the representations and agreements contained in the application therefor, and of the sum of $21.95, to

them in hand paid, and of the annual payment of $82.80, to be paid on or before the 28th day of October, in each and every year, during the continuance of the policy, and providing that in case the
16 said Thomas M. Carter shall not pay or cause to be paid the premiums as aforesaid in cash, on or before the date in said policy mentioned, the policy should be null and void, and of no effect; that the annual premiums upon said policy were regularly paid by the insured from the said date thereof to October, 1883, and upon the non-receipt of the premium for that date, the company declared the policy forfeited, and assumed to cancel the same, upon its books; that the said insurance company did not give the said Carter either prior or subsequent notice of the time when said premium became due, or the place where payable, as provided by said chapter 341 of the Laws of 1876, and the amendment thereto by said chapter 321 of the Laws of 1877; that there were two questions involved in said case; first, as to what was the meaning of the word "renewed," in said section 1 of the said act of 1876, as amended by the said act of 1877; and second, as to whether or not the payment of the annual premium upon a life-insurance policy constituted a "renewal" thereof, as that word was used in said act, thereby making said act applicable to life-insurance policies taken out before the passage thereof, and upon which the annual premium was paid after the passage thereof; that on, to wit: the 5th day of June, 1888, the said court of appeals of the said State of New York rendered its decision and judgment in said case of "*Carter vs. Brooklyn Life Insurance Company*," therein and thereby holding that the payment and receipt by the insurance company of each annual premium constituted a renewal of the policy, within the meaning of the term "renewed," as used in the said act of 1876, as amended by the act of 1877; and that said act applied to each and every policy made before the passage thereof, but which was renewed after the passage thereof, by the payment of the annual premium, and that the renewal of the policy by the payment of each annual premium constituted in substance and legal effect a new contract between the parties, as of the date the premium so paid became
17 due. For a more specific statement of the issues in said cause, and the opinion and decision therein, reference is hereby made to volume 110 of the New York Reports, at page 15, which said volume is one of the books of reports of cases adjudicated in said court of appeals, and which, at said page, and the pages immediately thereafter, contains the said decision and opinion in said case of "*Carter vs. Brooklyn Life Insurance Company*," and which said opinion and decision the defendant prays may be deemed and considered a part of this answer, the same, and with like force and effect, as if it were herein written at length.

6½. The defendant further says that by the constitution of New York now, and for more than thirty years last past, in force, it is, and was, provided, by article 8, section 1 thereof, as follows, to wit: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corpo-

ration cannot be obtained under general laws. All general laws and special acts, passed pursuant to this section may be altered from time to time, or repealed." Said section of said article is published in Banks & Brothers' eighth edition of the Revised Statutes of the State of New York, volume 1, page 76 and page 103, said section of said article being a part of the New York State constitution of 1846, and of the constitution of the State of New York in force January 1st, 1889, and that there is not, and never was any law or provision of the constitution of the State of New York, requiring a vote of two-thirds of each branch of the assembly or legislature, to amend or repeal the laws for the organization or creation of corporations, or granting special or exclusive privileges or immunities, but
18 that said laws under the constitution of the State of New York are passed by a majority of the members of each house of the legislature.

7. The defendant further says that in the year 1892 there was duly passed, at the 115th session of the legislature of the State of New York, and duly approved on the 18th day of May, 1892, an act known as chapter 690 of the acts of said 115th session of said legislature, entitled *an* "An act in relation to insurance corporations," constituting chapter 38 of the general laws, and designated in the published volumes of the laws enacted by said session of said legislature, and known as "the insurance law;" that by section 92 of said act it was and is provided as follows:

"No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy as in this chapter provided.

19 "If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to

the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given."

That by section 290 of said the insurance law it was and is provided as follows:

"Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed."

That in the schedule annexed to said act was and is, among other laws, the following:

"*Schedule of Laws Repealed.*

Laws of	Chapter	Sections.
1876	341	All
1877	321	All."

That by section 292 of said the insurance law it was and is provided as follows:

"The provisions of this chapter, so far as they are substantially the same as those of laws existing on September 30th, 1892, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter, and not as new enactments, and shall be applicable to all corporations formed under laws repealed by this chapter. References in laws not repealed to provisions of law incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this chapter shall be construed to amend or repeal any provision of the penal or criminal code."

That section 293 of the said the insurance law was and is the last section thereof, and was and is as follows:

"This chapter shall take effect on October 1, 1892."

Said sections 92, 290, 292 and 293, respectively, and said schedule of laws repealed, are published at pages 1972, 2037, 2038 and 2040, respectively, of volume 2, of the laws of the State of New York, passed at the 115th session of the legislature of said State.

8. The defendant further says that by the said proceedings of said legislature of 1892, and the passage and approval of the said the insurance law, the said law of New York, a portion of which is set out in said amended and substituted petition, and the said section 2, of which is hereinbefore set out in this answer was repealed, except as substantially continued by said section 92 of said act of 1892; that the said Frank C. Johnson duly paid that annual premium on said policy that became due and payable on the 11th day of November, 1892; and that the said provisions of said section

92, hereinabove fully set forth, became on said 1st day of October, 1892, and ever since said date has been, and now is, the law of New York, relating to the forfeiture of life-insurance policies for non-payment of premiums, and now is, and ever since said 1st day of October, 1892, has been the only law in said State on said subject.

9. This defendant denies that the said Frank C. Johnson assigned and transferred said policy of insurance to said plaintiff; denies that the said plaintiff is the owner thereof, and avers that no assignment whatever of said policy was ever made in duplicate, and both copies sent to the home office of the defendant, and avers that no assignment or notice of assignment of said policy, was ever filed with or given to the defendant, and further avers that if any
21 assignment of said policy was ever made, this defendant never had any notice or knowledge whatsoever thereof of any kind, and never heard of any pretended assignment of said alleged policy until the commencement of this suit.

10. The defendant further says that at least fifteen and not more than forty-five days prior to the said 11th day of November, 1893, which was the date when, by the terms of said policy, the 1893 annual premium thereon became due and payable, to wit, on the *16th day of October, 1893*, the said defendant duly addressed and mailed to the said Frank C. Johnson, at his last known post-office address, postage paid by this defendant, a notice partly written and partly printed, stating in said notice the amount of the premium due on said policy on said 11th day of November, 1893, to wit, the sum of $1160,00, and further gave in said notice the place where said premium should be paid and the person to whom the same was payable and further stated in said notice that unless said premium should be paid to the defendant, or to the duly appointed agent or person authorized to collect said premium, as in said notice stated, by or before the day it fell due, to wit, *the said 11th day of November, 1893*, the said policy and all payments thereon should become forfeited and void.

11. The defendant, further answering, denies that the said Frank C. Johnson or that the said plaintiff performed, or offered to perform, the provisions and conditions of said insurance policy, and avers that the said Frank C. Johnson wholly failed, neglected, and refused, to perform, or caused to be performed, the provisions and requirements of said policy, by him therein agreed to be performed, in this, that the said Johnson did not pay, or cause to be paid, that premium upon said policy, or any part thereof that became due and payable on the said 11th day of November, 1893, nor did he pay, or caused to be paid, any premium, or any part of any premium,
22 that became due and payable upon said policy subsequent to the November 11th, 1892, premium, but wholly failed, neglected, and refused so to do, and that no payment on account of the annual premiums on said alleged policy was ever made or offered to be made after the payment of that annual premium that became due and payable on the said 11th day of November, 1892.

12. Defendant further says that on to wit, the *10th day of December, 1892*, the said Frank C. Johnson made to this defendant a writ-

ten request that this defendant extend the benefits of its accumulation policy to his said policy, and that except as modified by such benefits said policy remain unchanged; that said defendant duly complied with said request, and extended to said policy the benefits of its accumulation policy; and the said defendant duly, and on or about the 20th day of January, 1893, made, executed, and delivered to said Johnson its certificate and agreement in writing, thereby certifying that pursuant to said request it extended to him as the legal holder of said policy No. 385048 the benefits of the accumulation-policy plan of the said defendant, as in said accumulation certificate stated. Copies of said written request and said accumulation certificate and agreement are hereto attached marked respectively Exhibit "A" and Exhibit "B."

13. That by the terms and conditions of said policy, as modified by the benefits of said accumulation-policy plan, as contained in said certificate, *and in full compliance with all the laws of the State of New York in such case made and provided*, it was agreed by and between the said Johnson and this defendant that in consideration of the payment of the premiums on said policy to the 11th day of November, 1893, the said insurance would be extended for the face amount of said policy to the 11th day of May, 1896, or on demand made within six months after the 11th day of November,
23 1893, with the surrender of said policy, paid-up insurance would be issued to the said insured for the sum of $1825.00, or that said policy would be reinstated within six months upon payment of said overdue premium, with interest thereon at the rate of five per cent. per annum.

14. The defendant further says that the said Johnson never made any demand upon this defendant for said paid-up insurance; that he never paid said overdue premium, or any part thereof; and that by reason of his failure in the premises that one of said benefits, by which, in consideration of the payment of the premium on said policy to November 11th, 1893, the said insurance for $25,000 upon his life would be extended to May 11th, 1896, *thereby* became operative, and said insurance was extended for the face amount of said policy, to the said 11th day of May, 1896, and that on said last-named day said policy expired by limitation.

15. Defendant further says that there *is* not now, and never *was*, in the State of New York any laws or statutes such as any one of the several following sections of the laws of the State of Iowa, as the laws of said State of Iowa appear in that compilation thereof, published by E. B. Ebersole under the authority and direction of the 26th General Assembly of the State of Iowa, and known as the Annotated Code of the State of Iowa, 1897, to wit: Section 1727, entitled "Forfeiture of policy," section 1728, entitled "Cancellation of policy," section 1741, entitled "Copy of application," section 1743, entitled "Conditions," section 1750, entitled "Who deemed agent," section 1789, entitled "Insurable age—beneficiary—assignment of policy," section 1813, entitled "Misrepresentation of age," and section 1819, entitled "Copy of application."

16. The defendant, further answering, denies each and every alle-

gation in said amended and substituted petition contained,
24 not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied.

Wherefore, this defendant prays that it may go hence with its costs.

JAMES H. McINTOSH,
Attorney for Defendant.

"EXHIBIT A—Attached to Answer.

"OMAHA, NEB., *Dec. 10th*, 1892.

"The New York Life Insurance Co. is hereby requested to extend the benefits of its accumulation policy to policy No. 385048, issued by the said company on the life of F. C. Johnson, with the understanding, that, except as modified by such benefits, said policy shall remain unchanged.

"F. C. JOHNSON,
"*Beneficiary, Insured.*

"E. C. SMITH, *Witness.*"

"EXHIBIT B—Attached to Answer.

"New York Life Insurance Company, 346 and 348 Broadway,
"New York.

"This certifies that in compliance with the request of the legal holders of policy No. 385048, issued on the life of Frank C. Johnson, the benefits of the accumulation-policy plan of the New York Life Insurance Company are hereby extended to said policy as stated on the next page.

"It is understood and agreed, that, except as herein expressly modified, the terms of said policy No. 385048 remain unchanged.

"In witness whereof, said New York Life Insurance Company has, by its duly authorized officers, signed and delivered this certificate, this twentieth day of January, one thousand eight hundred and ninety-three.

"(Signed) CHAS. C. WHITNEY, *Secretary.*
"(Signed) JOHN A. McCALL, *President.*"

25 The benefits referred to are as follows:

Payment of claims.—"This policy is payable immediately upon receipt and approval of proofs of death of the insured during its continuance.

Incontestability.—"This policy is not subject to any conditions or restrictions as to travel, residence, occupation, or manner of death. After this policy shall have been in force one full year, if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy, as to payment of premium, have been observed.

Benefits at end of accumulation period.—"If the insured is living on the eleventh day of November, in the year nineteen hundred and

ten, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:

"*First.* To continue the policy, and receive the dividend apportioned by the company, either

"(1) in cash; or

"(2) in an annuity, to be used in reduction of premiums, or to be taken in cash; or

"(3) in additional paid-up insurance, conditioned upon satisfactory re-examination.

"*Second.* To exchange the policy for its entire value, as stated below (*), either

"(4) in cash; or

"(5) in an annuity for life; or

"(6) in a paid-up policy.

"* (The said entire value of the policy consists of the guaranteed reserve ten thousand five hundred and seventy dollars ($10,570), and in addition thereto the dividend then apportioned by the company.)

"The insured shall notify the company in writing, prior to the end of the accumulation period, which benefit is selected. Failing such notification the apportioned dividend shall be applied to the purchase of an annuity as stipulated in benefit (2) above.

Dividends.—"No dividend shall be apportioned or paid on this policy before the end of the accumulation period. If this
26 policy is continued in force beyond the accumulation period, and if all premiums due have been paid, a dividend will be apportioned to the insured at the end of each period of five years thereafter.

Premium loans.—"After the premiums have been paid on this policy for ten years the company will loan to the holder of the policy (to enable him to continue it in force) the amount of any subsequent premium or premiums within the accumulation period, as the same shall become due; provided interest at the rate of five per cent. per annum is paid annually in advance upon all such loans. Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.

Grace.—"After this policy shall have been in force three months, a grace will be allowed of one month in payment of subsequent premiums; provided that in all cases when this grace is availed of interest at the rate of five per cent. per annum shall be paid to the company for the time deferred. During the month of grace the policy remains in full force.

Non-forfeiture.—"After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-

up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months, upon payment of the overdue premium with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing.

27 "*Table of Guarantees if Payment of Premiums is Discontinued.*

"Provided there is no indebtedness against the policy.

"(Pursuant to the insurance law (chapter 690, Laws of 1892) of the State of New York.)

If the premiums are paid—	(1.) The insurance of $25,000 will be extended—	Or (2.) The policy may be converted into paid-up insurance—
To Nov. 11, 1893.....	To May 11, 1896.....	Of $1825
" " " 1894.....	" Jan. " 1899.....	" 3045
" " " 1895.....	" Aug. " 1901.....	" 4225
" " " 1896.....	" do. " 1903.....	" 5250
" " " 1897.....	" do. " 1905.....	" 6175
" " " 1898.....	" May " 1907.....	" 7125
" " " 1899.....	" Feb'y " 1909.....	" 8075
" " " 1900.....	" Aug. " 1910.....	" 9000
" " " 1901.....	" Jan. " 1912.....	" 9750
" " " 1902.....	" May " 1913.....	" 10500
" " " 1903.....	" June " 1914.....	" 11175
" " " 1904.....	" July " 1915.....	" 11825
" " " 1905.....	" July " 1916.....	" 12400
" " " 1906.....	" June " 1917.....	" 12900
" " " 1907.....	" M'ch " 1918.....	" 13250
" " " 1908.....	" Nov. " 1918.....	" 13700
" " " 1909.....	" July " 1919.....	" 14025

"Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance, on the same basis as that on which the above table is constructed."

Upon the 1st day of December, 1897, plaintiff filed an amendment duly verified to her amended and substituted petition in words and figures (omitting formal parts) as follows:

Amendment.

"For an amendment to her amended and substituted petition the plaintiff says that it was stipulated in the application
28 upon which the policy in suit issued that the contract contained in said policy and in said application should be construed according to the law of the State of New York, the word 'construed' being used in the stipulation instead of the word 'governed,' as inadvertently stated in her amended and substituted petition; that in 1890, and shortly prior to the date of the policy in suit, the court of last resort in said State of New York construed a contract of insurance such as that herein sued upon, and determined the effect to be given the statute of that State set out in plaintiff's amended and substituted petition, in the case of *Baxter v. Brooklyn Life Ins. Co.*, reported in 119 New York Reports, at page 450 thereof, and decided that the said statute became a part of every insurance contract, such as that herein sued upon, issued after said law went into effect; and governed the rights of the parties in precisely the same manner and to the same extent as if said statute was actually incorporated, by the parties, into the insurance policy; and further decided that the duration and validity of such policy does not depend upon the payment of the premium on the day named in the policy but upon payment thereof within thirty days after the giving of the notice provided for in said statute, and that such an insurance contract could not in *any manner* be impaired because of nonpayment of the premium unless and *until* it was shown by the insurance company that said notice had been given, and that in a suit upon such policy it was not necessary for the plaintiff to allege or prove the payment of the premiums due thereon, until the defendant company proved the sending of the notice required to be given by said statute; that the decision in said case was subsequently reaffirmed by said court in the case of *De Frece vs. National Life Ins. Co.*, 136 'New York Reports' page 144, and that such construction and interpretation is the well-settled law of said State of New York.

"JOHN P. BREEN,
"*Att'y for Plaintiff.*"

December 4th, 1897, plaintiff filed her duly verified reply which (omitting formal parts) is in words and figures as follows:

Reply.

"Now comes the plaintiff and replying to the answer filed
29 herein to her amended and substituted petition, and to each separate defense thereof, denies that the insured, Frank C. Johnson, ever primarily or affirmatively requested the defendant to issue to him or extend to him the benefits of its 'accumulation-policy plan' embraced in the Exhibit 'B' attached to defendant's answer but avers the fact to be that said Johnson did not know about the so-called 'accumulation-policy plan' of the defendant

until the same was brought to his attention by the defendant, and that he never heard of its existence, or of its benefits until the agents of the defendant company informed him about it and offered to extend its provisions to his policy as an allurement to him to continue the payment of premiums on his policy and to induce him to the belief that with this 'accumulation-policy plan' of the defendant's extended to his policy, it would be a safer and more liberal policy of insurance to him than other policies which he was then carrying upon his life. Plaintiff expressly denies that the said 'accumulation-policy plan' was given to said Frank C. Johnson, or accepted by him with special reference to a default in the payment of any *particular* premium to become due on the policy.

"Plaintiff avers the real fact to be that said 'accumulation-policy plan' is but a certificate embracing the provisions of a statute of the State of New York passed by the legislature of that State at its 115th session, and known as section 88 of chapter 690 of the laws of said session and is now found in the general statutes of said State, ninth edition edited by Chas. A. Collin at page 1171, which statute gave the insured Frank C. Johnson substantially all the privileges and benefits embraced in the said 'accumulation-policy plan.'"

Still further replying to the defendant's answer the plaintiff admits that in the year 1892, at its 115th session, the legislature of New York passed the statutes set out in the seventh paragraph of the defendant's answer in substantially the same terms as set out in said paragraph of defendant's answer, but the plaintiff alleges that there was passed at said 115th session of said legislature as a part of said chapter 690 mentioned in this seventh paragraph of defendant's answer and known as sec. 291 thereof, the following law:

30 "Saving clause.—The repeal of a law, or any part of it specified in the annexed schedule, shall not effect or impair any act done, or right accruing, accrued, or acquired, or penalty, forfeiture or punishment incurred prior to October 1st, 1892, under or by virtue of the laws so repealed, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed; and all actions or proceedings, civil or criminal, commenced under or by virtue of the laws so repealed and pending September 30, 1892, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law."

That aside from the above-quoted "saving clause" the courts of last resort of said State of New York, as well as all other courts of record of said State, have so construed and applied subdivision 1 of sec. 10 of art. 1 of the Federal Constitution as to exclude and prohibit the application of any laws set out in the said seventh paragraph of defendant's answer to the policy in suit, and that independent of the aforesaid "saving clause" and without reference to the law of the State of New York construing and applying said section of the Federal Constitution, the laws set out in said seventh

paragraph of defendant's answer have no bearing upon or application to the policy in suit whatever.

Still further replying to said defendant's answer the plaintiff denies that it ever was or is the law of the State of New York that a life-term policy of insurance, such as is herein sued upon, was or is "renewed," within the meaning of the section of the laws of 1877 set out in plaintiff's amended and substituted petition, every time an annual premium is paid upon such a policy, but on the contrary avers the fact to be that it was, prior to the issuance of the policy in suit, and still is, the law of said State of New York that a policy of life insurance for a life term is not a contract from year to year but is an entire and indivisible contract and not a contract which
31 is "renewed" from year to year by the payment of each annual premium as the same becomes due and that such doctrine and rule of law was well settled as the law of that State in the cases of *Sands vs. N. Y. Life Insurance Co.*, 50 N. Y. Reports, page 626; *Cohen vs. N. Y. Mutual Life Insurance Co.*, 50 N. Y. Reports, page 610; *Homer vs. Guardian Life Insurance Co.*, 67 N. Y. Reports, page 478, and other cases decided by the courts of the State.

Still further replying the plaintiff says that she denies that the defendant sent to the last known post-office address of the said Frank C. Johnson the notice required to be given by the statutes set out in the seventh paragraph of defendant's answer. She denies that any notice required by the statute pleaded in her amended and substituted petition, or required by the statute pleaded in the seventh paragraph of defendant's answer, was ever mailed, sent, or given to the said Frank C. Johnson, or to her.

Still further replying to said answer she denies each and every allegation therein contained which is not hereinbefore expressly admitted to be true.

JANE JOHNSON,
By JOHN P. BREEN, *Her Att'y.*

Agreement.

It was agreed in open court by the parties that defendant's answer filed to plaintiff's amended and substituted petition should now stand and be considered its answer to any amendment filed by plaintiff to such petition, and such agreement was put on record by the reporter.

Trial.

Plaintiff's evidence.

The plaintiff introduced and read in evidence Exhibits 3, 4, 5, 6, 7 and 8, which are in words and figures as follows:

32 EXHIBIT 3.

OMAHA, NEB., *Feb. 18th*, 1897.

New York Life Ins. Co., 346–348 Broadway, New York city.

Received Oct. 23, 1897, home office.
Received Feb. 23, 1897, policy claim department.

GENTLEMEN: I enclose you three additional affidavits touching the death of Frank C. Johnson, insured in your company under policy number 385048. I submitted you on Jan. 28th, the affidavit of Mrs. Jane Johnson, the claimant under the policy and also my own affidavit, respecting the death of the said Frank C. Johnson, but have not heard from you yet from home office. The enclosed affidavits complete the proof as I understand your policy and I renew my demand for settlement and payment of the amount due on this policy.

Very respectfully, JOHN P. BREEN.

EXHIBIT 4.

"STATE OF NEBRASKA, }
"*Douglas County*, } *ss:*

"I, Agusta K. Detwiler, on oath do say that I am a practicing physician residing at 304 North 22nd street in the city of Omaha; that I attended the late Frank C. Johnson, who resided at 216 North 22nd street in said city, during his last illness and almost continually from day to day for more than a year before he died and up to the time of his death on the 28th day of September, 1896; that I personally know that the said Frank C. Johnson died at his
33 residence, at 216 North 22nd street in said city of Omaha, on the 28th day of September, 1896.

"AGUSTA K. DETWILER.

"Subscribed in my presence and sworn to before me this 19th day of February, 1897.

"[L. S.] CHAS. S. ELGUTTER,
"*Notary Public.*"

EXHIBIT 5.

"STATE OF NEBRASKA, }
"*Douglas County*, } *ss:*

"I, John McQuoid, on oath do say that I am the resident pastor of the First Methodist Church of the City of Omaha, and occupied that position on the 28th day of September, 1896; that I conducted the funeral services at the funeral of the late Frank C. Johnson at his residence, No. 216 North 22nd street, in the city of Omaha, and accompanied the funeral cortege to the burial ground and saw the body consigned to the grave; that I knew Frank C. Johnson during

his lifetime and that I personally know that he died in the city of Omaha on the 28th day of September, 1896.

"JOHN McQUOID.

"Subscribed in my presence and sworn to before me this 19th day of February, 1897.

"[L. S.] LOUIS R. LIGHTON,
"*Notary Public.*"

EXHIBIT 6.

"STATE OF NEBRASKA, } ss:
"*Douglas County,* }

"I, Henry K. Burkett, on oath do say that I am the county coroner of Douglas county, Nebraska, and am engaged in the undertaking business in the city of Omaha, in said county; that on the 30th day of September, 1896, I officiated at the funeral service of Frank C. Johnson at his residence, No. 216 North 22nd street, in said city, and had charge of the body and accompanied the funeral cortege to the burying ground and saw the body consigned to the grave; that I knew Frank C. Johnson in his lifetime and know that he died in said city of Omaha on the 28th day of September, 1896.

"H. K. BURKETT.

"Subscribed in my presence and sworn to before me this 19th day of February, 1897.

"[L. S.] M. F. SEARS,
"*Notary Public.*"

EXHIBIT 7.

"STATE OF NEBRASKA, } ss:
"*Douglas County,* }

"I, Jane Johnson, of lawful age, on oath do say that I am the widow of the Frank C. Johnson named in policy No. 385048 of the New York Life Insurance Company, for the sum of $25,000.00, issued to the said Frank C. Johnson on the 27th day of December, 1890, and now have in my possession the said policy; that the said Frank C. Johnson died on the 28th day of September, 1896, in the city of Omaha, Nebraska at No. 216 North 22nd street; that the Rev. McQuoid of the First Methodist Church of Omaha conducted the funeral services and that Henry K. Burkett was the undertaker and funeral director who officiated at the funeral of the said Frank C. Johnson.

"JANE JOHNSON.

"Subscribed in my presence and sworn to before me this 28th day of January, 1897.

"[L. S.] LEONARD HARTSON,
"*Notary Public.*"

EXHIBIT 8.

"STATE OF NEBRASKA, }
"*Douglas County,* } *ss*:

"I, John P. Breen, on oath do say that, during his lifetime, I was well acquainted with Frank C. Johnson named in life-insurance policy No. 385048 in the New York Life Insurance Company, issued on the 27th day of December, 1890; that I was present at his funeral and that the Rev. McQuoid, of the First Methodist Church of Omaha, conducted the funeral service, and that Henry K. Burkett,
35 the well-known undertaker and funeral director of said city, officiated at said funeral; that I personally know that the said Frank C. Johnson died at his residence No. 216 North Twenty-second street in said city of Omaha, on the 28th day of September, 1896.

"JOHN P. BREEN."

"Subscribed in my presence and sworn to before me this 29th day of January, 1897.

"[L. S.] LEONARD HARTSON,
"*Notary Public.*"

Thereupon it was admitted in open court by counsel for defendant that the defendant received said Exhibits 3, 4, 5, 6, 7, and 8 at the home office, on the date stamped on said exhibits, viz: Febr'y 23rd, 1897, and such admission was put on record by the report.

EXHIBIT 13.

Plaintiff introduced and read in evidence Exhibit 13—a receipt for premium, which is in words and figures as follows:

"New York Life Insurance Company, 346 & 348 Broadway, New York.

"Notice to policy-holders.—All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, actuary or secretary, and countersigned by such agents. If any premium is not paid on or before the date when due, the policy under its conditions becomes void. The acceptance of any past-due premium by the company is subject to the condition, and upon the express warranty on the part of the holder of the policy, that the insured is in good health and is not a waiver of the conditions of the policy as to future payments. No agent has power on behalf of the company to make or modify any contract of insurance; to extend the time for paying a premium; to waive
36 any forfeiture; to issue a permit for residence, travel or occupation, or to bind the company by making any promise or receiving any representation or information.

"Received, New York, November 11, 1892, $1060—, in full for annual premium due this date, on policy No. 385048.

"G. A. SMITH, *Manager.*

"JOHN A. McCALL, *President.*"

EXHIBIT 9.

Plaintiff introduced and read in evidence Exhibit 9—a written agreement of the parties relative to the statutes, reports and relative jurisdiction of the several courts of New York, which (omitting title of court and case) is in words and figures as follows:

Agreement.

"It is hereby stipulated and agreed by and between the parties hereto that the printed statutes of the State of New York, named and known as 'The Revised Statutes of the State of New York, eighth edition,' consisting of four volumes edited by Montgomery H. Throop, and published by Banks & Bros., law-book publishers, vol. 1 thereof containing what purports to be a *fac-simile* certificate of Frederick H. Cook, secretary of state, touching the correctness of said volume, are, and ever since their publication as shown on the title pages thereof, have been in general use in the legal profession and in the courts of the State of New York, and are commonly admitted as evidence of the constitution and all the laws of the State of New York purporting to be contained in them, by the courts of that State.

"It is further stipulated and agreed that two volumes of the statutes of New York, known and named 'The Revised Statutes of the State of New York; supplement to eighth edition and to Birdseye's Statutes,' and numbered volumes 5 and 6 of said eighth edition, and edited by Charles A. Collin, and published by said Banks Bros., are in general use in the legal profession and in the courts of the State of New York, and were and are commonly admitted as
37 evidence of all the laws of said State purporting to be contained in them, by the courts of said State.

"It is also stipulated and agreed between the parties hereto that the statutes of New York known and named 'The Revised Statutes of the State of New York; ninth edition,' and edited by Charles A. Collin, consisting of four volumes, including the index volume, and published by the said Banks & Bros. are, and ever since their publication, as shown on the title pages thereof, have been in general use in the legal profession, and in the courts of the State of New York, and are commonly admitted as evidence of the constitutions and all the laws of the State of New York, purporting to be contained in them, by the courts of that State.

"It is also agreed that a supplemental volume to said ninth edition of the statutes of New York, numbered volume 5 of said ninth edition, and edited by the said Charles A. Collin and published by the said Banks & Bros., is likewise recognized by the legal profession and the courts of the State of New York as correctly containing

the laws purporting to be contained in it, and that said vol. 5 of said ninth edition is commonly admitted as evidence of all the laws of the State of New York, purporting to be contained in it, by the courts of that State.

"It is further stipulated and agreed between the parties hereto that that publication by said Banks & Bros., 1892, and consisting of two volumes and entitled 'Laws of the State of New York; 115th Session of the Legislature, Begun January 5th, 1892, and Ending April 1, 1892, in the City of Albany,' is commonly admitted in the courts of the State of New York as evidence of the laws of said State passed by that session of the legislature of said State, and that said publication has been published under the authority of the said State of New York.

"It is also stipulated and agreed between the parties to this action that that publication by the publishing-house of Weed, Parsons & Co., of Albany, New York, 1877, entitled 'Laws of New York, 100th Session, 1877,' and containing what purports to be a *fac-simile* certificate of John Bigelow, secretary of state, touching the authenticity of said publication, is commonly admitted in the courts
38 of the State of New York as evidence of the laws of said State passed at that session of the legislature of said State; and that said publication has been published under the authority of the said State of New York.

"It is further stipulated between the parties hereto that that publication by the publishing house of Charles Van Benthuysem & Sons, 1876, entitled 'Laws of the State of New York, 99th Session, 1876,' and containing what purports to be a *fac-simile* certificate of John Bigelow, secretary of state, is commonly admitted in the courts of the State of New York as evidence of the laws of said State passed at that session of the legislature of said State, and that said publication has been published under the authority of said State of New York.

"It is further agreed that now, and for more than fifty years last past the court of last resort in the State of New York is, and during all of said time has been, the court of appeals; that the cases decided in said court of appeals, including the decisions and grounds thereof, have been reported in a series of reports commonly referred to, and known as 'New York Reports,' of which there are now one hundred and fifty-two volumes, the several volumes thereof purporting on their title pages to contain 'Reports of cases decided in the court of appeals of the State of New York.' That said series of reports, commonly called New York Reports are, and ever since the publication of the several volumes thereof, as shown by their respective title pages have been in general use in the legal profession, and in the courts of the State of New York, and are, and ever since the publication of the several volumes thereof have been commonly admitted by the courts of the State of New York, as evidence of all the decisions, and the grounds thereof, of the several cases purporting to be contained and reported therein.

"It is further stipulated and agreed that there is, and for more than fifty years last past has been a court having general jurisdic-

tion in law and equity in the State of New York, which is called the supreme court and which is a court of inferior jurisdiction to the said court of appeals; that reports of cases heard and determined in said supreme court have been published in 99 volumes down to and including the year 1896, and that that publication of
39 said reports by Banks & Bros., law-book publishers, the first seven of which are edited by Abraham Lansing, and the last ninety-two of which are edited by Marcus T. Hun, are, and ever since the publication thereof, as shown by the dates of publication appearing on the title pages of the several volumes thereof, have been in general use in the legal profession, and in the courts of the State of New York, and are commonly admitted as evidence of the decisions of the courts of the State of New York, purporting to be contained in them, by the courts of that State.

"It is further stipulated and agreed that there is, and ever since the year 1892 has been, a series of reports, called the 'Miscellaneous Reports,' purporting to contain cases decided in the inferior courts of record of the State of New York, including the superior court of the city of New York, the court of common pleas of the city of New York, superior court of Buffalo, city court of Brooklyn, city court of New York, surrogate court, etc., etc., edited by F. B. Delehenty, and published by James B. Lyon, of which Miscellaneous Reports there are, down to, and including a portion of the year 1897, nineteen volumes; that the courts in which the cases were decided, and purport to be reported in said Miscellaneous Reports, were all inferior to the said court of appeals, and that said Miscellaneous Reports are, and ever since their publication, as shown on the title page of the several volumes thereof, have been in general use in the legal profession, and in the courts of the State of New York, and are commonly admitted as evidence of the decisions of the several courts therein purporting to be contained by the courts of that State.

"It is further understood and agreed that the object and purpose of this agreement is to lay the foundation for introducing in evidence upon the trial of this cause the constitutions and statutes of the State of New York, and the decisions of the courts thereof, so far as they may be deemed material or relevant under the issues in this case, and to determine the names and the extent of the relative jurisdiction of said several courts, and that this agreement is to be received as furnishing a sufficient foundation for introducing in evidence the constitution, statutes, laws, and decisions of the several courts, of the said State of New York, as they appear in any one of the several volumes hereinabove described, and as concluding the parties hereto as to the names and extent of the relative
40 jurisdiction of said courts, and that except as to the said purposes in this paragraph contained said agreement is to be without prejudice to either party to this suit.

JANE JOHNSON,
By JOHN P. BREEN, *Her Attorney.*
NEW YORK LIFE INSURANCE COMPANY,
By JAMES H. McINTOSH, *Its Attorney.*"

JOHN W. DIAS.

The plaintiff next introduced and read in evidence the deposition of JOHN W. DIAS, taken in the city of New York, on the 16th day of October, 1897, pursuant to commission and notice duly served, and filed in this case upon the 18th day of October, 1897, who testified as follows:

"My name is John W. Dias. I am 34 years old, and I am a clerk in the employ of the First National Bank of the City of New York, and I reside in the city of New York. I am acquainted with the defendant in this case, The New York Life Insurance Company, and with its place of business and business offices in New York city.

"On the 20th day of February, 1897, I took the sum of $3,615, in legal tender of the United States, to the cashier of the New York Life Insurance Company, at its offices number 346–348 Broadway in the city of New York, and I offered the said money in payment of premiums and interest on policy of insurance issued to one Frank C. Johnson of Omaha, Nebraska, which he refused to take, and was directed by him to the 'information and law department' of said company in the same offices, and I offered the said money $3,615, to the person in charge of said department in payment of past-due premiums of insurance and interest on policy issued to one Frank C. Johnson, which was refused by the said person in charge of said department of 'information and law' of the New York Life Insurance Company. On the 24th day of February, 1897, I went, again, to the offices of the New York Life Insurance Co., 346–348 Broadway in the city of New York, to the 'information and
41 law department office, and, again, I offered to the person in charge of said office the sum of $3,615, in legal-tender money in payment of premiums and interest on policy of insurance issued on the life of Frank C. Johnson which he refused to take, saying he would not take it, and I was then by him referred to Mr. Hubbel, attorney for the New York Life Insurance Company in the same office, and I offered to him, the said Mr. Hubbel, the attorney for said company, the sum of $3,615 in legal-tender money of the United States in payment of premiums of insurance, on policy of insurance on the life of Frank C. Johnson, which he refused, saying he would not take it."

Defendant admitted in open court, by its attorney, that the only policy of insurance ever issued by it to said Frank C. Johnson is the policy in suit in this case and such admission was put of record by the reporter.

Case Law of New York.

EXHIBIT —.

The plaintiff introduced and read in evidence the opinion of the "court of appeals" of the State of New York in the case of *Baxter vs. Brooklyn Life Insurance Company*, reported in volume 119 of the "New York Reports" beginning at page 450, it being admitted

of record in open court that the book produced was one of those named in Exhibit 9, which opinion is in words and figures as follows:

"*John F. Baxter, Respondent, vs. Brooklyn Life Insurance Co., Appellant:*

"(Argued January 29th, 1890; decided February 25th, 1890."

"O'BRIEN, *J.:*

"The plaintiff is the assignee of a policy of insurance upon the life of one Joel J. Mattison issued by the defendant dated May 24, 1884, whereby in consideration of a quarter-annual premium of $20.97 to be paid upon delivery of the policy, and thereafter on the 24th day of August, November, February and May in each year, the
42 defendant insured Mattison's life in the sum of $3,000, payable to his wife, at the office of the company in the city of New York, within sixty days after receipt of satisfactory proof of death during the life of the policy. The policy was made subject to numerous conditions, none of which are important for the purpose of this appeal except the condition that it should be void upon failure to pay the premium when due. The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made the payments of premium according to his agreement with the defendant. No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premium which became due on the 24th day of August, 1884, had not been paid. On the trial the plaintiff put in evidence the policy and a written assignment, by the wife of the insured, to him of the claim or cause of action, and rested. The defendant moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the twenty-fourth day of August prior to the death of the insured. This motion was denied and defendant excepted, and the only question in the case is thus presented. The death of the insured occurred within less than four months from the time the policy was delivered. The production of the policy at the trial proved the payment of the first quarterly premium. But it was essential to the maintenance of the plaintiff's cause of action to show that the policy was a valid, subsisting contract at the time of the death of the insured. The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question

and governed the rights and obligations of the parties in pre-
43 cisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy.

"The promise of the defendant was to pay to the beneficiary named the sum of $3,000 upon the death of the insured, in case that event occurred *during the continuance of the contract.* It, therefore, becomes important to inquire whether the policy in question was in force at the time of the death of the insured on the 7th day of September, 1884. If, upon that day, it was a valid, subsisting contract, notwithstanding the failure to pay the premium due on the preceding 24th day of August, then the very contingency upon which the defendant agreed to pay the amount of the insurance has happened.

"The statute above referred to (Laws 1877, chap. 321) declares that no life insurance company doing business in this State shall have *power* to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless, after it becomes due, a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void. It also provided by the same section that in case such payment is made within the thirty days limited therefor, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and it declares that no such policy shall in any case be forfeited, until the expiration of thirty days after the mailing of such notice. These provisions are to have full effect, *any condition* to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days *after* the notice had been given. The condi-

tion upon which the policy can be forfeited, or in any way
44 impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The complaint alleges that the insured, after the time of the death, made the payment on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life till the twenty-fourth of August prior to his death, was established and admitted. It was not necessary to prove that he also paid the premium on the twenty-fourth of August, because the contract was not impaired by a failure to pay on that day, but by a failure to pay within thirty days after the defendant had served the statutory notice. The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of

premium. In the absence of proof, on the part of the defendant, as to the service of notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and statute when read together. Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium.

"It must, therefore, be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured, and even if the payment of the last premium was omitted the obligation and promise of the defendant to pay upon death, *during the life of the policy*, was unimpaired. The purpose of the statute referred to was to establish a rule which would preserve to the assured the benefits of premiums paid, and to prevent the lapse of policies of life insurance without ample notice, and an opportunity to save them from forfeiture by payment of premiums due within the specified time, and at the same time secure to the company, in case it is obliged to pay, the full amount of the premium which the policy calls for. When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rule of law. When the scope and purpose of the law as deduced from the decision of this court and the courts of other States involving a construction of the same or similar statutes is considered, no good reason is perceived for interfering with the result in this case in the court below. (*Phelan vs. N. M. L. Ins. Co.*, 113 N. Y., 147; *Carter vs. Brooklyn Life Ins. Co.*, 110 *id.*, 15; *Carter vs. John Hancock Mutual Life Ins. Co.*, 127 Mass., 153; *Boyd vs. Cedar Rapids Ins. Co.*, 70 Ia., 325.)

"It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the 24th of August prior to the death of the insured. If the policy was in *full force* when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the assured or her assignee, except to present to the defendants the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the persons entitled to the benefits of the policy had only to establish the fact of death within the time and in the manner prescribed therein. The contract was kept in life by force of the statute, until the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to

be deducted by the defendant from the sum due upon the policy. This puts the defendant in precisely the same position in which it would have been if the premium had been duly paid. (*Carter vs. John Hancock M. Life Ins. Co., supra.*)

"It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and thus no injustice has been done.

"The judgment should be affirmed."

The plaintiff introduced and read in evidence the opinion of the court in the case of *Rowe vs. Brooklyn Insurance Co.*, reported
46 in volume 16 of "Miscellaneous Reports" of New York, p. 323 etc., it being admitted of record that the book produced is one of those named in Exhibit 9, which opinion is in words and figures as follows:

Sophia L. Rowe, Plaintiff, vs. The Brooklyn Life Insurance Co., Defendant:

(Supreme Court, March, 1896.)

"WRIGHT, *J.*:

"The defendant, on December 23, 1865, upon the application of the plaintiff, issued and delivered to her a policy upon the life of her husband, the late Nathan M. Rowe, Esq., of Oswego, who died August 29, 1893.

"By the terms of the policy the defendant, 'in consideration of the representations and agreements contained in the application therefor and of $67.50 to them in hand paid by Sophia L. Rowe, wife of Nathan M. Rowe, and of the annual premium of $67.50, * * * to be paid * * * do assure the life of Nathan M. Rowe in the amount of $2,000, * * * and do hereby promise and agree with the said Sophia L. Rowe, well and truly to pay to her the said sum assured for her sole use, or in case she shall die before the said Nathan M. Rowe, to pay the said sum assured to her heirs, executors, administrators or assigns within sixty days after due notice and proof of the death of said Nathan M. Rowe, the balance of the year's premium, if any, and all indebtedness due or to become due the company to be first deducted therefrom; * * * this policy * * * is granted by this company and accepted by the said Sophia L. Rowe upon the express conditions, that * * * in case the said Sophia L. Rowe shall not pay or cause to be paid the premiums * * * or any note given * * * in payment of any premium, on the day or days when the same shall become due, except the note given for half the annual premium * * * or shall not renew such last-mentioned note when the same shall become payable, and pay the interest or discount thereon * * * this policy shall cease and be null and void. * * *

"'And it is further agreed * * * that the divi-
47 dends of profits (if any) which may become payable by virtue of this policy to the holder thereof shall be applied

toward the payment of the note taken for half premiums aforesaid; and that if this policy shall cease or become null and void * * * Sophia L. Rowe, her heirs, executors or assigns, shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid, except the balance remaining unpaid on the note taken for half premiums.'

"The defense is that the policy, by the volition of the beneficiary, became lapsed in 1883.

"The president of the defendant, by a letter to the plaintiff's attorney, dated December 15, 1895, wrote: 'The insured and assured voluntarily lapsed the policy in 1883—the policy became null and void and no value whatever in 1893, and that, too, by the volition of the beneficiary.

"This letter was introduced by the plaintiff as an admission, for the purpose of showing that the policy was in force after chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877; went into effect, and it does show that fact. Therefore, the policy is to be read as if those statutes were literally incorporated into it; and as said in *De Frece vs. Nat. Life Ins. Co.*, 136 N. Y. 141; 'The plaintiff was not bound to allege or prove the payment of the annual premiums when due. * * * There could be no forfeiture for this cause unless the defendant alleged and proved non-payment *after* the due service of the notice required by law.

"Said statute requires that the notice respecting the premium or interest due or to become due shall be 'addressed and mailed to the person whose life is assured.'

"On December 23, 1883, a premium became due. It appears that thirty days prior thereto, and within the statutory period, the defendant mailed Nathan M. Rowe a notice, stating that $56.63 would be due on said policy on December 23, 1883; no premiums were paid thereafter, and the defendant claims that the policy consequently lapsed.

* * * * * * * * * *

48 "Again, the notice did not state the correct amount due on the policy, but stated a considerable larger amount than was due. The policy could not be forfeited by the non-payment of such excessive amount, and the notice was not, therefore, the statutory notice. And the defect was not waived by Mr. Rowe's neglect to call attention to it in the correspondence above mentioned, because the benefit of a statute which, in pursuance of a general policy, requires notice of the accruing premiums on life-insurance policies to be given to the assured *cannot be waived*. *Phinney vs. Mutual Life Ins. Co., of New York*, (C. C.), 67 Fed. Repr. 493. * * *

"The plaintiff is, therefore, entitled to judgment against the defendant for $2,000, and interest up to date of the entry of judgment, less said indebtedness, with interest to the same date on each of the aforesaid yearly balances of said indebtedness, to be struck as above directed, with costs.

"Ordered accordingly."

Mrs. JANE JOHNSON.

The plaintiff, Mrs. JANE JOHNSON, being called as a witness and duly sworn, testified as follows:

"I am the plaintiff in this case, and the widow of Frank C. Johnson. My husband died in Omaha, at 216 North 22nd St., our residence, on the 28th day of September, 1896.

"The signature to Exhibit '2' now shown me is my husband's signature, Frank C. Johnson. This paper (Exhibit '2') was delivered to me by Mr. Johnson in the fall of 1895—November. I already had the policy in my possession, and I have had the policy and this assignment in my possession ever since until I delivered them to you, (Mr. Breen.)"

"Nothing has ever been paid upon this policy by the company."

The plaintiff here introduced and read in evidence Exhibit "2" referred to and identified by the witness, Mrs. Jane Johnson, which is in words and figures as follows:

49 EXHIBIT 2.

"For value received I hereby assign and transfer unto Jane Johnson (wife) of Omaha, Nebraska, the policy of insurance known as No. 385048, issued by the New York Life Insurance Co., on the life of Frank C. Johnson, of Omaha, Nebraska, and all dividend, benefit, and advantage to be had or derived therefrom, subject to the conditions of the said policy, and to the rules and regulations of the company.

"Witness — hand and seal, this — day of ——, one thousand, eight hundred and ninety —.

"FRANK C. JOHNSON."

"STATE OF NEBRASKA, } ss:
"*County of Douglas,* }

"On this 15th day of November, 1895, before me personally came Frank C. Johnson, to me known to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

"[Seal Dist. Court.]

"FRANK E. MOORES, *Clerk,*
"By JOHN PALMQUIST, *Deputy.*"

JAMES W. JOHNSON.

JAMES W. JOHNSON called by the plaintiff and duly sworn testified as follows:

"I am a son of plaintiff. I obtained the blank for Exhibit No. '2,' now shown me, from the office of the New York Life Insurance Company, in the New York Life building, in Omaha for my father. I went there to get the blanks for him, and some one in that office who gave me this blank asked what I wanted it for and I stated

that it was to assign the policy from my father to mother. The person who asked that about it then filled out the body of the blank, and that writing in there in the blanks above my father's name was put in by that person in the office. I took the blank home and either handed it — father or to some other member of the family for him."

50 EXHIBIT 1—The Policy and Application Attached.

The plaintiff introduced and read in evidence the policy in suit and the copy of the application upon which it issued attached thereto, together with all endorsements upon said policy and the same was marked by the reporter Exhibit 1.

The policy here introduced and read in evidence is in words and figures the same as set out in the pleadings and already shown in this abstract page 2.

The following endorsement appears upon the outside of the policy when the same is folded:

"E. C. Smith, agency director, rooms 305 & 306, Sapp building, Council Bluffs,—Iowa—agent."

Application.

The application here introduced and read in evidence, as a part of said Exhibit 1, is in the following words and figures:

"*Application for a Distribution Policy in the New York Life Insurance Company.*

"1.	Name (in full) of the person applying for insurance on his life.—Frank C. Johnson.	
"2.	(*a.*) Present residence.—Between Randolph and Omaha, county of Fremont, State of Iowa. (*b.*) Post-office address.—Omaha (California & 16th Sts.), county of Douglas, State of Neb. hereafter.	
"3.	Occupation or employment; if more than one, state all.—Banking and real estate.	
"4.	(*a.*) How long have you been engaged in present occupation? (*b.*) Are you married?	(*a.*) Banking at Randolph, Ia. 4 years. At Omaha, about 18 months. (*b.*) Yes.
51		
"5.	(*a.*) Place of birth.—Canada. (*b.*) Race or nationality.—White.	(*c.*) Born on—12th day of May, 1846. (*d.*) Age nearest birthday.—45.
"6.	(*a.*) Are your habits at the present time, and have they always been, sober and temperate?	(*a.*) Yes.

	(*b.*) To what extent do you use intoxicating drinks as a beverage?	(*b.*) Never touch it in any form.
	(*c.*) Are you now engaged in any way in the retailing of alcoholic liquors?	(*c.*) No.
	(*d.*) Have you ever been so engaged?	(*d.*) No.
"7.	(*a.*) Are you now insured in this company, or have you ever been?	(*a.*) No.
	(*b.*) If so, state numbers of policies and amounts.	(*b*) —
"8.	(*a.*) Have you any other insurance on your life?	(*a.*) No.
	(*b.*) If so, state in what companies, when taken, the kinds of policies, and their respective amounts.	(*b.*) —
"9.	(*a.*) Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than applied for?	(*a.*) No.
	(*b.*) If so, state full particulars, to what company, when, etc.	(*b.*) —
52		
"10.	(*a.*) To whom is the insurance applied for to be payable in the event of death? (Give the name in full.)	(*a.*) Myself.
	(*b.*) Present residence?	(*b.*) —
	(*c.*) What relation to you?	(*c.*) —
"11.	(*a.*) Do you desire a policy on the "distribution-policy" plan, as set forth in that policy form?	(*a.*) Yes.
	(*b.*) If so, which distribution period do you select?	(*b.*) I select the 20-year distribution period.
	(*c.*) Do you desire a policy with mortuary dividend, as set forth in the following note?	(*c.*) Yes.

"NOTE.—On the 15-year-period policy, the mortuary dividend is payable only if death occurs in the last five years of the period, and is equal to the premiums paid within the said five years. On

the 20-year-period policy, the mortuary dividend is payable only if death occurs in the last ten years of the period, and is equal to the premiums paid within the said ten years.

"12. Sum to be insured, $25000. Policy to date November 11, 1890.

"13. Any policy issued under this application will contain an agreement that: If it shall lapse or become forfeited for the non-payment of any premium after at least three full premiums have been paid (that is to say the premiums for four years of insurance), a paid-up policy will be issued on demand made within six months after such lapse with surrender of the policy, under the same conditions as this policy except as to payment of premiums, but without participation in profits, for such an amount as the net reserve on the policy at the time of the lapse computed by American table of mortality and interest at four and one-half per cent., after deducting all indebtedness to the company, will purchase as a single premium at the present published rates of the company, at the age of the insured at the time of the lapse.	
In consideration of this agreement for a surrender value in paid-up insurance, do you waive, in case of lapse or forfeiture, all right to any other surrender value provided for by the statute of any State or country, and do you specifically waive the provisions of chapter 347 of the Laws of 1879 of the State of New York?	Yes.

53

"14. Where have you resided (during summer and winter) during each of the last ten years?—Part of the time past year in Omaha, Neb.,—15 yr. Randolph, Iowa.

"15. (*a.*) Name of an intimate friend.—
(*b.*) His post-office address.—

54

"16. (*a.*) State your former residence if recently changed.	(*a.*) —
(*b.*) Have you any intention of changing your residence? If so, state the intention.	(*b.*) No.
(*c.*) Do you agree that, if you shall, during the two years next following the date of any policy which may be issued hereon, reside or travel within the tropics, or engage in blasting, mining, submarine operations, aeronautic ascensions, the manufacture of gunpowder, dynamite or other explosive substances, or in service upon any railroad train, or in switching or coupling cars, or upon any steam or other vessel, without first obtaining written permission from the company, the said policy shall become null and void, and all payments made thereon shall belong to the company?	(*c.*) Yes.
"17. What cash premium has been paid to make the insurance under this application binding from this date, provided the risk is accepted by the company?	A premium of $— has been paid upon condition that if the risk is not accepted by the company, the cash actually so paid is to be returned.

"I do hereby agree as follows: 1. That the statements and representations contained in the foregoing application, together
55 with those made to the medical examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warranty being a condition precedent to, and a consideration for the policy which may be issued hereon. 2. That, inasmuch as only the officers of the home office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on

any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing, and presented to the officers of said company, at the home office, in this application. 3. That in any distribution of surplus or profits, the principles and methods which may be adopted by said company for such distribution, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. 4. That any policy which may be issued under this application, shall not be in force until the actual payment to, and acceptance of the premium by said company, or its authorized agent, during my lifetime and good health. 5. That the contract, contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York. 6. That no suit shall be brought against said company under said contract after the lapse of one year from the time when the cause of action accrues.

"Dated at Randolph, Iowa, this 18th day of Dec., 1890.

FRANK C. JOHNSON."

(That part of application setting out statements to medical examiner is omitted, as no question arises thereon.)

The plaintiff here introduced in evidence from "Session Laws of New York, 1877," sec. 1 of chap. 321 of laws passed at that
56 session, and it was admitted of record that the book from which this evidence was introduced was one of the books stipulated as being admissible under the agreement of the parties, Exhibit 9, which section, so introduced is in words and figures as set out in plaintiff's amended and substituted petition as already shown in this record at page 8.

Defendant's Evidence.

The defendant introduced and read in evidence Exhibit "*16*," being the "accumulation-policy plan," set out in its answer as Exhibit "B" and it is in words and figures as there set out, as already shown in this record at page 24.

The defendant also introduced and read in evidence from volume No. 2 of the session laws of New York of the 115th session of the legislature of that State in 1892, sections 92, 290, 292, 293, and a "schedule of laws repealed" of chap. 690 designated "the insurance law" and it was admitted of record that the said book was one of those stipulated as being admissible in evidence under the agreement of the parties, Exhibit 9.

Said sections and "schedule of laws repealed" are in words and figures as set out in the seventh paragraph of defendant's answer as already shown in this record at page 18.

The defendant introduced and read in evidence the opinion of the "court of appeals" in the case of "*Thomas M. Carter vs. The Brooklyn Life Insurance Company*, from volume 110 of the "New York Reports," page 15 etc., it being admitted that said book is one of those named in Ex. 9, which opinion is in words and figures as follows:

"*Thomas M. Carter, Respondent, vs. The Brooklyn Life Insurance Company, Appellant*

("Argued May 4th, 1888; decided June 3rd, 1888.)

"RUGER, *Ch. J.*:

57 "The plaintiff is a resident of the city of Albany, in the State of Georgia, and the defendant a life insurance company located and doing business in the city and State of New York. In the year 1870 the defendant issued and delivered to the plaintiff an insurance policy upon his life for $5,000, 'in consideration of the representations and agreements contained in the application therefor, and of the sum of twenty-one dollars and ninety-five cents to them in hand paid * * * and of the annual payment of eighty-two dollars and eighty cents to be paid on or before the twenty-fifth day of October in each and every year during the continuance of the policy,' and providing that 'in case the said Thomas M. Carter shall not pay or cause to be paid the premiums, as aforesaid, in cash, on or before the day herein mentioned for the payment thereof * * * then the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and be null, void and of no effect.' A notice was printed upon the policy stating, among other things, that 'premiums must be paid on or before the day when due * * * and if the premiums be not settled when due, a policy becomes forfeited.' That 'all premiums are due and payable at the office of the company in the city of New York, but for the convenience of policy-holders residing at a distance, it may be paid to an agent, but only on the production of a receipt signed by the president or secretary, who are alone authorized to sign receipts on the part of the company. * * * In all cases notices will be sent as regularly as possible, but solely as a matter of courtesy; as these often miscarry from a variety of causes, it is absolutely necessary that a policy-holder should make particular note of the dates when his premiums come due, for the company will not be responsible for any omission or miscarriage of notice.'

"The annual premiums upon this policy were regularly paid by the insured to the company from the date thereof to October, 1883, and upon the non-receipt of the premium for that date the company declared the policy forfeited and assumed to cancel the same upon its books. The defendant did not give the plaintiff either prior or

subsequent notice of the time when such premiums became due or the place where payable, as provided by chapter 341, Laws of 1876, and the amendment thereto by chapter 321, Laws of 1877. Previous to the year 1878, the defendant, at the request of the plaintiff, was in the habit of sending receipts in anticipation of the day
58 of payment to the Central Railroad and Banking Company at Albany, in Georgia, for collection, and the plaintiff regularly paid such premiums to that company, taking up the receipt therefor held by it.

"In September, 1876, after the passage of chapter 341 of the laws of that year, the defendant sent the plaintiff to his address at Albany, Georgia, a copy of such law and a notice thereon indorsed stating that 'notices will be sent as required by statute,' and that 'all premiums are due and payable at the office in New York.' These notices were repeated upon all subsequent premium receipts sent to the plaintiff. After this time the plaintiff was in the habit of remitting premiums directly to the company at New York.

"In each of the years 1878 and 1879 the defendant transmitted notices of the time for the payment of premiums addressed to Thomas M. Carter, Albany, Georgia. In 1880, however, without any authority from the plaintiff, the company assumed to change the address upon the notices sent to him from that heretofore employed to 'Thos. M. Carter, care of the Central Railroad and Banking Co., Albany, Georgia.'

"These notices were received by that company and were regularly delivered by it to the plaintiff for the years 1880, 1881, and 1882, and he regularly paid the annual premiums on the policy at the company's office in New York for those years. The notice for the year 1883 was not, however, delivered to the plaintiff. Upon this state of facts several questions arose upon the trial, among which, the material ones are:

"*First.* Whether the law of 1876, requiring notices to be sent to policy-holders, applies to this policy

"*Second.* Whether the assurance expressed by the defendant upon its notices thereafter sent to the plaintiff, that it did so apply, authorized him to act in reliance thereon and estopped the defendant from claiming that it did not apply to such policy; and

"*Third.* Whether the notice sent by the defendant in 1883, conformed, in respect to the manner of its transmission, to the requirements of such law?
59 "It is contended by the appellant that the act applies only to policies issued or *renewed* after its passage, and that a policy cannot be said to have been renewed unless it has become forfeited or lapsed, and has been afterward restored or reinstated by the company.

"The language of the statute, as expressed in the laws of 1876, is that 'no life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy thereafter issued or *renewed*, by reason of non-payment of any annual premiums, or interest, or any portion thereof, unless a notice in writing stating the amount of the annual premium or interest due,

and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her *last known* post-office address, not less than thirty nor more than sixty days next before such payment becomes due according to the terms of such policy. This act was amended by chapter 321, Laws of 1877, but, so far as this case is concerned, in no respect rendering a particular notice of the amendment necessary. The act should be construed according to the popular signification of the language used, and with the view of securing to the policy-holders in life insurance companies the benefits contemplated by the legislation.

"That the defendant supposed the law applied to the policy held by the plaintiff plainly appears from the notices indorsed by it upon each receipt thereafter issued and sent to him. The company, instead of sending notices under the clause of the policy which provided for them, as an act of courtesy, assumed that he was entitled to them as a matter of right, and informed him that the notices required by the statute would be sent, and in case he changed his post-office address, requested notice of such change to be given to it. The defendant must have referred to this statute, as there was no other requiring the service of notice, and the plaintiff had a right to rely upon the assurance that the defendant thus gave him of annual notices for the payment of premiums (*Ins. Co. vs. Eggleston*, 96 U. S., 572).

"We are also of the opinion that the payment and receipt by the company of each annual premium, constituted a renewal of
60 the policy within the meaning of the term 'renewed,' as used in the act.

"While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void and of no effect, but when paid it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or *renewed* the policy as it approached the period of its agreed termination.

"It is not according to the popular notion of the meaning of the word 'renewal' that it can take place only after the death or expiration of the subject to which it is applied. Thus, to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired, for after that time it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its popular sense, is to refresh, revive or rehibilitate an expiring or declining subject, but is not appropriate to describe the making of a new contract or the creation of a new existence (Webster's Dictionary, Worcester's Dictionary). It would be at the option of an insurance company to re-execute a forfeited contract of insurance,

and if the act was held applicable to such a policy alone, it would confer no legal right whatever upon the policy-holder. It was the evident object of the act to make it apply to some existing policies and confer some legal right upon their holders to avoid a cause of forfeiture; and if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should ever be any *renewed* policies thereafter or not.

"We are, therefore, of the opinion that the plaintiff's policy was renewed within the meaning of the act. We are also of the opinion that no such notice was given to him as the statute required. The law reads that the notice should be sent to the assured at his *known* place of address, and there is no claim but that the defend-
61 ant knew his place of address at all times subsequent to the year 1880. It would, of course, be competent for him to agree upon some other mode of address, but, in the absence of such an agreement, the defendant was not at liberty to adopt another address by which the notice might or might not reach him. The plaintiff had never changed his post-office address, or notified the defendant that he intended to do so. It sent the notice to the Central Railroad and Banking Company without authority from him, and thereby made that company its agent to deliver it. It took the risk of its delivery and assumed the consequences of a failure upon the part of its agent to perform the duty intrusted to it. The plaintiff was under no obligation to object to any mode of sending such notices which was effectual to accomplish their object, for so long as he actually received the notices in time, he had no cause for complaint. The statute, however, imposed the duty upon the defendant of sending the notices to the plaintiff in a particular manner, and when it did so it acquired the right to declare a policy forfeited for non-payment of the stipulated premiums. It was, therefore, incumbent upon the defendant to show that it had complied with the *terms* of the statute, and it did not do this by showing a delivery of a notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in doing so it acted illegally. The criticism made by the defendant upon the sufficiency of the plaintiff's offer to pay the premium due in 1883 is untenable. The answer admits the receipt by the defendants of the draft for that sum remitted by the plaintiff, and makes no question as to the amount thereof, or as to the mode in which the tender was made. It is now quite too late to raise this question.

"For the reasons stated, we think the judgment of the courts below should be affirmed.

"All concur.

"Judgment affirmed."

The defendant introduced and read in evidence Exhibit 21, consisting of three papers marked "Kruger's Exhibits, 'A,' 'D' and 'C,'" which are in words and figures as follows:

62 ("EXHIBIT 21.)

"KRUGER'S EXHIBIT 'A.'

"CITY OF SIOUX CITY, }
"*County of Woodbury, State of Iowa,* } *ss:*

"E. H. Kruger being duly sworn, says: I am, and was at the times hereinafter mentioned, a clerk of the office of G. A. Smith, manager of the New York Life Insurance Company, appointed by said company to collect the premiums due on the policies in the annexed lists marked 'A,' 'B' and 'C.' On the 16th day of October, 1893, the notice required by section 92, chapter 690, Laws of 1892, State of New York, was duly addressed and mailed by said E. H. Kruger to each of the persons whose lives were at the time of said mailing insured respectively by the policies whose numbers are contained in said annexed lists marked 'A,' 'B' and 'C,' and to each of the assignees of said policies, where notice of assignment had at the time of said mailing been given to said company, at his or her last known post-office address, postage paid by said company. The names of said persons whose lives were insured and of said assignees, and said last known post-office addresses, are the same as those written at the time of said mailing in the policy registers of said company, as the persons whose lives were then insured and their assignees, and their last known post-office addresses. Said notices were mailed at least fifteen and not more than forty-five, days prior to the date when the premiums of said policies were respectively payable.

"Said annexed lists 'A,' 'B' and 'C' contain besides the numbers of said policies, the amounts of the premiums due on said policies.

"Said notices were deposited by me, a person authorized to mail them, on said day in the post-office in the city of Sioux City, Iowa.

"Said notices were partly written and partly printed; annexed is a copy of the printed portion."

63 "In the notice sent to each of the persons whose lives were insured by the policies in the list hereto annexed, marked 'A,' and to the assignees of said policies where notice of assignment had been given to said company, the word 'Quarterly' was printed instead of the word 'Annual.'

"In the notice sent to each of the persons whose lives were insured by the policies in the list hereto annexed, marked 'B,' and to the assignees of said policies where notice of assignment had been given to said company, the word 'semi' was printed before the word 'annual.'

"In the notice sent to each of the persons whose lives were insured by the policies in the list hereto annexed, marked 'C,' and to the assignees of said policies where notice of assignment had been given to said company, nothing was printed before the word 'annual' and after the word 'an.'

"In all the notices so sent out, after the words 'premium of $,' was written the amount of premium opposite the number of the policy in the annexed lists.

"The blanks in that part of said notice reading 'on the — day of ——,' were in each case filled up with the date when said premium was due. Said dates were the same as those written at the time of said mailing in the policy registers of said company.

"E. H. KRUGER.

"Sworn to before me this 17th day of October, 1893.

[Notarial Seal, D. W. Corley, Iowa.]

"D. W. CORLEY,
"*Notary Public.*"

KRUGER'S EX. "D." (Attached to his Ex. "A.")

"New York Life Insurance Company, 346 and 348 Broadway, New York.

"Mr. —— ——,
—— ——.

"DEAR SIR: Pursuant to the insurance law of the State of New York, you are hereby notified that during the continuance of
64 policy No. — on the life of yourself, an annual premium of $— will be due and payable at the home office, 346 and 348 Broadway, to the cashier of the company, on the — day of ——, 1893, and that unless such premium then due shall be paid to the company or to a duly appointed agent or person authorized to collect such premium on, or before, the day it falls due, such policy and all premiums thereon will become forfeited and void, except as to the right to any surrender value or paid-up policy which may be provided in said policy, pursuant to said insurance law.

"Yours truly, JOHN A. McCALL, *President.*"

(On left-hand margin:)
"Please notify the company of any change of address."
(On right-hand margin:
"Please present this notice when you pay this premium."

KRUGER'S EXHIBIT "C." (Attached to his Exhibit "A.")

List of Policies Whose Premiums are Payable Annually.

Number of policy.	Amount of premium due.	Number of policy.	Amount of premium due.	Number of policy.	Amount of premium due.
379746	29.20	382823	98.20	426411	51.25
751	38.80	845	102 50	428	80.
753	48.60	385004	41.	429	80.
756	70.	048	1060.	432	61.80
757	71.60	088	41.90	473	43.20
759	59.60	380	142.50	516	88.60
792	109.60	608	193.50	545	33.20
380220	89.	387794	48.80	576	77.60
221	89.	408961	53.40	588	42.50

When said Exhibit "21" was offered the plaintiff objected to same as incompetent and improper evidence—immaterial, and the objection overruled by the court—exception taken.

EDWARD H. KRUGER.

The defendant offered and read in evidence the deposition of E. H. Kruger, taken before A. S. Beardsley a notary public at Sioux City, Iowa, on the 4th day of October, 1897, who testified as follows:

65

Examination by Mr. McINTOSH:

"My name is Edward H. Kruger; 26 years of age, I reside in Sioux City, Iowa, and clerk in Humphrey's store.

"I was clerk in the office of G. A. Smith, manager of the New York Life Insurance Company at Sioux City, Iowa, in October 1893. I had been working for Mr. Smith previous to that, and for some time subsequent. I have seen the document marked Kruger's Exhibit A., and the Exhibit 'C' attached thereto, which you now show me, before. That is my signature attached to Exhibit 'A,' as affiant.

"Policy No. 385048 appears on page 3 of 'C' on the 4th line; the number of the policy and the premium due; the premium due is in column 4 on line 4.

"The Exhibit 'C' attached to my Exhibit 'A' was made about the time of sending the notice.

"I believe Exhibit 'A' was made about the same time. Exhibit 'D' attached to my Exhibit 'A' is the printed portion of the notice which I sent to the insured in policy number 385048. The notice which I sent differed from this blank form, Exhibit 'D' in that the name of the insured, his address, the number of the policy on that line (indicating), the amount of the premium, and on the 11th day of October, 1893.

"Q. 11th day of October, 1893?

"A. Yes, that is on this line, due.

"Q. Well what do you mean when you say 11th day of October, 1893?

"—. That it the date of the policy, due.

"The date was taken from the policy register, I think, and whatever date of the maturity of the premium appeared on the register would be the same as in the notice I sent.

"If on the policy register the date of maturity of the premium appeared November 11, 1893, that would be the date of the maturity of the premium that was filed in that notice as sent.

66 "Q. Now, if on the policy register at that time the insured by policy number 385048 and his address were Frank C. Johnson, Randolph, Iowa, and the date of the maturity of his premium for that year appearing on the policy register was November 11th, 1893, then you may state and give in full to the notary the exact notice as sent by you on the 16th day of October, 1893, if you can?

"Objected to by plaintiff as calling for a statement of a conclusion of the witness, incompetent, immaterial, irrelevant. By the court—overruled—and plaintiff excepts.

"A.

"New York Life Insurance Co., 346 and 348 Broadway, New York.

"Mr. Frank C. Johnson, Randolph, Iowa.

"DEAR SIR: Pursuant to the insurance law of the State of New York, you are hereby notified that during the continuance of policy number 385048 on the life of yourself, an annual premium of $1060 will be due and payable at the home office, 346 and 348 Broadway, to the cashier of the company on the 11th day of November, 1893, and that unless such premium then due shall be paid to the company or to a duly appointed agent or person authorized to collect such premium on or before the day it falls due, such policy and all premiums thereon will become forfeited and void, except as to the right to any surrender value or paid-up policy which may be provided in said policy, pursuant to said insurance law.

"Yours truly, JOHN A. McCALL, *President.*

"I put on the envelope the address—Frank C. Johnson, Randolph, Iowa,—put on the address of the insured under policy number 385048 as appeared on the policy register at that time, and I addressed the envelope accordingly, and folded the notice and put it into the envelope, and sealed the envelope, and put a two-cent stamp on the envelope and delivered it to the post-office—deposited in the mails at the post-office. I did this for the New York Life Insurance Co. The New York Life Insurance Co. paid the postage and I mailed this notice on the 16th day of October, 1893."

67 Cross-examination.

Examined by JOHN P. BREEN:

"I left the employ of the company about July, 1894.

"The office where I was employed was in the 'Peavey Grand.' I think it was room 16, on 4th St. I couldn't say the number of the room. When I commenced my employment with the company I took care of the policies as they came in—registered them, and that was my daily occupation, and then the mailing department of the notices was also mine; that is, every month I had them to send out on the 15th or 16th of each month. That part of my occupation regarding the registering of the policies consisted in copying the dates and names of the insured and the number of the policies and the premium—taking and copying them in the different books; that is take and copy the same date as appeared in the policies as they were sent from the home office in New York. The book where this data was recorded was called the 'policy register.' When we sent out these notices we referred to the policy and to the policy register to see that the notices were copied right, and everything like that. I have no recollection now of ever having seen this par-

ticular policy, I have no exact remembrance of it. I did not make any memorandum of that policy on any policy register here in the Sioux City office. I signed Kruger's Exhibit 'A' on the 16th day of October, 1893.

"I know that I either sent it on the 15th or 16th. I know that from the custom of the office. That is not my handwriting in the body of Exhibit 'A.' My signature is all the writing that is mine upon that paper. I did not personally make out this Exhibit 'A,' but I read it over carefully before I signed it. I do not recollect of reading this one. I could not say whether I read that particular one or not. I might not have read it though. I did read a great many of them. I know it to be a fact that I sent all the notices and mailed all the notices, and it could not be any other way but that way. I know it was my duty to send them out, and so I conclude simply because it was my duty, that I did send them. It was part of my duty to mail these notices and I have every reason to think that it was sent, that singular one,—and I believe it was sent.

68 I cannot name another man for whom I carried a letter to the post-office on that day, but I deposited the notices in the mails. I conclude from the fact of seeing this Exhibit 'A' that I sent, on the 16th day of October, 1893, a notice to Frank C. Johnson. I cannot name any man to whom I mailed a notice on that day, or a letter—I cannot think of any just now, but I know that I handled all of them and sent them out. To tell that I sent that particular one I would have to see the records, but I know it couldn't be any other way. I took this letter of Johnson's to the mail in the evening, I am positive—in the evening after closing the office at six o'clock I mailed those letters. I do not remember of addressing this particular one now. This was a letter, not a card. I am sure of that. It was not by a printed postal card, but by printed sheets with blanks on them to fill out, the date the premium became due, and they were filled in and I addressed the letters according to the policy register and also according to the policy. I think I have seen Exhibit 'D' before. I have seen ones that were the same thing. Of course, I could not say that particular one, but I have every reason to believe that I sent a notice like that one to Mr. Johnson. It is an exact copy of the one I sent to Johnson. They were all alike; it couldn't be any other way. I know that I handled those notices. They were handed by others in the office to me. 'Well sir, I couldn't say whether I filled those out or not.' I don't think that I filled that one myself personally. I know that it must have been done, because I look them over. It might have been at noon that I took the notices to the office; generally when we closed the office or at lunch, noon, we would take them. I couldn't say now when I took the one that was sent to Johnson, whether in the evening or at noon, and I couldn't say whether I sent that individual one on that date, but I have every reason to believe that I did, simply from the custom. I have no recollection of putting this particular card or letter addressed to Frank C. Johnson into a mail box. I have no particular recollection of taking this particular one on my desk and putting a two-cent stamp on it. I answer that

question the same as I did the other questions on that same subject. It was the custom to do it and therefore, I conclude I did it.

"I addressed it—Randolph, Iowa. I say that because I have seen the policy register and know that that was his address at that time. I couldn't state without seeing the register that those
69 notices were sent out. I did not make Exhibit 'C' attached to my Exhibit 'A.' Those are not my figures. I did not copy it. I know who did it. I think I have seen it before it was shown me here today. I think I saw it about the time that those notices were being made out on the 16th of October, 1893. Mrs. Wianand handed it to me. Of course, I don't know just exactly whether it is correct or not, but I don't know any other way it can be, it is correct. I don't know that to be a fact of my own knowledge."

Redirect examination.

By J. H. McIntosh:

"In order to determine to whom I sent a notice at any one month if I had an affidavit I made that month and the exhibits thereto attached and the policy register, I would look over the policy register and the name of the insured and the amount of the premium due would be on there at that time. I have said that Exhibit 'C' was not made out in my handwriting. I think it was made out in my presence. I said Mrs. Wianand made it. I have seen her make the exhibits; that was part of her work. I think she made the exhibits from the notices after they were filled out. I am sure of that, and then after she made out the notices I sent them in the manner I have stated."

Recross-examination.

By Mr. J. P. Breen:

"I told you on cross-examination that I didn't make Exhibit 'C' attached to my Exhibit 'A;' I think I saw it made. 'Well, sir,' I could not say that I saw Mrs. Wianand writing that particular one. I simply think that she made this one because she was accustomed to make such papers in the office. I think I would know her handwriting. It was her figures. I think that is her handwriting. I saw her make figures.

"I couldn't say on that particular paper. Our desks were right together side by side; they wasn't any more than three feet apart."

Mrs. Edith Wianand.

The defendant produced and read in evidence the deposi-
70 tion of Mrs. Edith Wianand taken before A. S. Beardsley, a notary public at Sioux City, Iowa, on the 4th day of October, 1897, and filed in this case on the 12th day of October, 1897, who testified as follows:

Examination by Mr. J. H. McIntosh:

"My name is Mrs. Edith Wianand, I reside at Sioux City, Iowa, am cashier Pelletier Dry Goods Company. I know the defendant, The New York Life Insurance Company. My name was Edith Peters during the month of October, 1893. That was my maiden name. I was employed as clerk in the office of G. A. Smith, manager of the New York Life Insurance Company, at Sioux City, Iowa, during the month of October, 1893. During that month I knew one E. H. Kruger. He was in the employ of the New York Life Insurance Company. He worked in the same room with me during that month. His desk was right beside mine. Exhibit 'C' which is attached to 'Kruger's Exhibit A' is in my handwriting.

"I got the figures contained in Exhibit 'C' from the 'renewal notices.' I mean by 'renewal notices' the paper identified as 'Kruger's Exhibit D.' The name usually applied to those notices in the office was 'renewal notices.' After I made Exhibit 'C' from these 'renewal notices,' such as Kruger's Exhibit 'D,' the renewal notices were passed over to Mr. Kruger for mailing purposes. When I made the figures in 'Exhibit C' attached to Kruger's Exhibit 'A' from the renewal notices the blanks in the notices were filled out. After these renewal notices were passed over to Mr. Kruger for mailing purposes I saw him addressing the envelopes and going through the work for mailing to the addresses contained in them. He used to address them and stamp them and take them to the post-office,—seal them up."

Cross-examination.

By Mr. J. P. Breen:

"I made this Exhibit 'C' which has been shown me and all of it. I cannot answer as to when. The date is on there. It was made in 1893. In October, I think. I know what year I made it but I cannot tell what month. I got the figures on there from the renewal notices.

71 "Exhibit 'C' is a copy of something else—from the renewal notices from such as Kruger's Exhibit 'D.' I took a bunch of these renewals, such as Kruger's Exhibit 'D,' and from them I would take the figures that I would put down in Exhibit 'C.' I have seen a paper similar to Exhibit 'D' before. I saw it just before I came into the room and that is the first time I have ever seen that paper. The renewal notices were just like this. I know they were just like that, because I have seen blanks similar to that before. I am able to state that Kruger's Exhibit 'D' is exactly in phraseology and words like the notices I copied from, I copied those lists from notices that looked like that.

"I left the employ of the New York Life Insurance Company when the branch office moved to Des Moines in 1894 and I have not seen any of the notices that I am speaking about since that time. I have not compared this Kruger's Exhibit 'D' now shown me with any notices such as I had, or have had since the time I left in 1894

and still I am able to state that this is exactly similar in words and terms to one that I saw in 1893. It looks just the same. I think it was just the same. As far as my recollection goes it is just the same and I am willing to solemnly swear that it does contain the exact language, and I do.

"I did not fill out any of the blanks in these 'notices' in 1893. I do not know who made them out. I presume they came from the New York Life office in New York city. They were handed to me. They were handed to me by the cashier, D. W. Corley. He was the cashier in the office here in Sioux City. I didn't have anything to do with the policy register.

"It is not true that at times I took these figures from the policy register. I didn't compare the figures set down in Exhibit 'C' with the policy register. I never had anything to do with the policy register. I got the figures on this Exhibit 'C' under headings—'Number of policy' and 'Amount of premium due' from the 'renewal notices'—a slip like this Exhibit 'D.' The number of the policy, the fourth entry from the top of page three on that Exhibit 'C'—the center two columns—is 385048. I don't see it there. No sir; it was understood though. That is understood. I copied the last
72 three figures; I didn't copy all of the figures in taking the number of the policy. 048 is not the number of the policy, 385048 is the number of the policy.

"All that I attempted to copy out of the 'notices' was the number of the policy and the amount of the premium. I don't pretend to know whether or not these other blanks were filled out. I don't know anything about those. I simply looked each time when I got a 'notice,' to see whether or not the number of the policy was given in the blank prepared for that purpose, and the amount of premium, and when I got these two items I was satisfied with just that information. I would not pretend to claim now that I know the balance of the blanks in these notices were filled out. I have no recollection whether they were now or not. After I prepared Exhibit 'C' from these 'notices' they were handed over to Mr. Kruger and he addressed them and sealed them. I handed them over to Mr. Kruger. They came from another clerk—from the cashier, Mr. Corley. I don't know of my own knowledge, of course, what became of them after I passed them over on to the other desk to Mr. Kruger. I simply mean it to be understood that it was his duty to address them. He was particularly careful that they were addressed right. I think that this Exhibit 'C' was prepared the same day that these notices were supposed to be sent out. I don't have any recollection of that.

"It isn't a fact that this (Exhibit 'C') was made out after the notices were mailed. I don't know that there were other means by which these figures could be obtained than obtaining them from these 'notices.' I said a moment ago that this Exhibit 'C' was made on the same day that the notices from which these figures are copied, were mailed, or supposed to be mailed. I couldn't say that this one (Exhibit 'C') was made the same day. I wouldn't say as to this one. I am almost sure that I made it all in one day, but cannot

tell what day. It is quite a long while since I worked for the New York Life and I don't recollect.

"In regard to my work I usually took one thing and done it in one day, and after that I don't know whether they sent the renewal notices the same day or not. I don't know anything really of my own personal knowledge about the sending of the notices."

73 Redirect examination:

"This is the only form that I know anything about—I mean Kruger's Exhibit 'D' and I may never have seen this particular sheet before, but I have seen one similar to this—I mean the printed part was the same. As I understand Exhibit 'C' and what is shown on the 4th line of the third column of the 3rd page of that paper, the number of the policy is 385048. It was unnecessary to put down the '385' every time. Instead of putting '385' every time we just put the last three numbers of the policy. The next number below this would be 385380 and the next below that, 385608. The other blanks, in addition to this that I copied, in those 'notices' were filled out."

Recross-examination:

"I mean to say that wherever there was a blank for a date or a word that they were filled out, because I wouldn't have anything to get my number from.

"I was doing work that required attention to only two of the blank spaces, the number of the policy and the amount. I had nothing to do with looking to see whether or not the other blanks in the form were filled out or not. If they were not filled out I think I would have noticed it and that is the reason that I think that they were. I didn't read them all over, that is each one of them, but sometimes I had occasion to read them all over. I won't pretend to say that the notice from which I took this 385048 and the premium $1060, was filled out except as to these two particulars. I didn't fill out any of these notices. Sometimes I would have a bunch of these renewal notices, such as Kruger's Exhibit 'D,' two or three hundred of them at a time."

Mrs. Anna Phelps Smith.

The defendant produced and read in evidence the deposition of Mrs. Anna Phelps Smith, taken before A. S. Beardsley, a notary public at Sioux City, Iowa, on the 4th day of October, 1897, and filed in this case upon the 12th day of October, 1897, who testified as follows:

74 Direct examination:

"My name is Anna Phelps Smith. Age 25 years; residence, Gillette, Colorado; occupation, housewife. My maiden name was Anna Phelps. I was not married in October, 1893. I was in the employ of the N. Y. Life Insurance Co., G. A. Smith, manager, at

Sioux City, Iowa, during the month of October, 1893. I was stenographer and policy clerk, at times, and helped generally. I helped in every direction that I was needed. I saw the 'renewal notices' that were sent out from time to time after they were filled out and prepared for sending and before they passed to Mrs. Wianand to make a list of the numbers of the policies and the amounts of the premiums. Before they passed to Mrs. Wianand for the purpose of making out a list of the numbers of the policies and the amounts of the premiums, I checked them with the policy register. I have seen the book which you now hand me before. It is what we call the 'policy register.' It was kept in the office of G. A. Smith here. This register was made out prior to my coming to the office to work. It was kept up to the time they left. They moved the office to Des Moines. I entered their employ in January, 1892, in Sioux City. The office moved from Sioux City in May, 1894. To my knowledge the 'policy register' which I have in my hand was kept in the office here from the middle of January, 1892, until May, 1894. There was always one to assist me in the checking and they read off the policy number, the name, the town and the amount of the premium, and whether it was annual, or semi-annual, or quarterly, and if the register in this policy book coincided exactly with the notices, I placed a check in the column under the date due to indicate that it was perfectly correct. I have turned now in this policy register in my *my* hand to the policy number 385048. The entry in relation to this policy is in the handwriting of Miss Sarah Avery; she was the policy clerk at the time this was entered. From the date here it shows that this was entered in 1890, November the 11th. I know that the entries that are here now were there on the 16th, or during the month of October, 1893, with relation to policy 385048. Again, as to the method of checking the 'renewal notices,' I say, they were placed on a long desk, and as the party read them off, I looked along here, the number of the policy, 385048, Frank C. Johnson, Randolph, Iowa, the premium, $1060, annual, and if that
75 entirely coincided with the 'renewal notice,' I placed a check-mark right there (indicating).

"Q. Right where?

"A. Right under the line; you see here it gives the date October, November, December, and here, I checked there to indicate that it was due in that month; it was due in November.

"Q. And is there such a check-mark on this register?

"Objected to by plaintiff as calling for a conclusion of the witness, giving the contents of a book in her hands, improper and incompetent—by the court—overruled—exception by the plaintiff.

"A. Yes, sir.

"After they were checked up in this way, they were turned over, I think, to Miss Peters—Mrs. Wianand now, to make out this list. I am speaking now of the list which has been referred to as Exhibit 'C' attached to Kruger's Exhibit 'A.'

"On page 116 of this policy register the number of the policy appearing to be that of Frank C. Johnson is incomplete. The num-

bers 048 is incomplete as it appears there. The space indicates that it is meant for a duplicate of 385, the space being left that way according to the custom of the office, that is—the number at the top of the page is 385. It was our custom to read it in the office 385048. The 385 is at the top of the page."

Cross-examination.

By Mr. J. P. BREEN:

"In the column headed number, date and to the left of the name Frank C. Johnson the three figures 048 is not the complete number of that policy, as it looks to you, but to the office force it was complete, because the space being left there indicated that it was a repetition of 385; therefore the number was 385048. I mean to say that if you carry down from the top of the column headed 'number, date,' the numbers 385 you prefix to the numbers 048 opposite this name, Frank C. Johnson, and that makes the complete num-
76 ber of the policy. The ditto marks further to the right and under the term 'solicitor,' indicates as in the register above, that E. C. Smith is the solicitor. It indicates that E. C. Smith was the person or agent who solicited the Frank C. Johnson policy. It means that he is the man that obtained the application from Johnson and afterwards forwarded it to the home office.

"The letter 'C' a little further on to the right under the date 'due,' indicates that it was canceled; that stands for canceled. According to the date over the check-mark 'returned 1-19-'94,' we put the 'C' there, that always indicates that the policy is void. Mrs. Wianand put that 'C' there in red ink, January 19, 1894. I didn't do it. That is her handwriting. The entry 'returned 1-19-1894' is Mrs. Wianand's handwriting, too. The figures '2-12' indicate that the agent sent the second premium to the office Feb'y 12th. Mr. Smith must have sent the premium. I am sure his office was in Council Bluffs at that time."

Redirect examination.

By Mr. J. H. MCINTOSH:

"The premium indicated by this '2-12' was 1455—that is the first premium.

"The words and figures 'returned 1-19-'94' mean on the policy book that the 'renewal receipt'—the unpaid renewal receipt was returned to the home office in New York city for cancellation on that date—Jan. 19, 1894.

"Q. And the policy on that day was marked as canceled, on that day, because of failure to pay the premium?

"A. Was marked canceled on that day because of failure to pay the premium.

"Q. Do you know what that premium was that the book indicates was unpaid?

"A. $1060.00.

"Q. Well, for what year—became due what year?

"A. 1893.
"Q. What date?
"A. November 11th."

Recross-examination.

By Mr. J. P. BREEN:

"The figures '5-13-'93' found in the column mean the
77 second time that the premium was paid—the third year's insurance. $1060 was paid then '5-13-'93.' The fifth month, thirteenth day, 1893, $1060 was paid, according to that book. I mean to say that the premium due on this policy November 11th, 1892, was not paid until the 13th of May, 1893, according to the indications on this book. It was paid to E. C. Smith, at Council Bluffs, as I interpret this book."

Redirect examination.

By Mr. J. H. MCINTOSH:

"Q. Does this May 13th, 1893, indicate the date when Johnson paid it or the date when this office was notified that it had been paid?
"A. It was paid to us on that date.
"Q. But you don't know when, and the books do not indicate when Johnson paid it?
"A. Our books do not; it just indicates when the money came to us.
"Q. E. C. Smith was the person appointed by the company to collect the premium?
"A. Yes sir.
"Q. And as to when he collected it you do not know, and the books do not show?
"A. No, the books do not show. It was paid to us on that date."

CHAS. C. WHITNEY.

The defendant introduced and read in evidence the deposition of CHAS. C. WHITNEY taken before H. H. Bottome, a notary public in New York city on the 12th day of October, 1897, and filed in this case upon the 15th day of October, 1897, who testified as follows:

"My name is Chas. C. Whitney; age 65 years; secretary of the New York Life Insurance Company, and I reside in Brooklyn. This deposition is being taken in my office. I am not acquainted with the plaintiff. I have been connected with the defendant for 21 years. I attend to all official correspondence between the company and others. The company keeps records which show in what local-
ities it maintains agencies, but they are not under my
78 immediate custody, but are under my control. This company has never maintained what is known by the company as an agency in Pottawattamie county, Iowa, but it has had agencies in said county, though no regular branch office has ever been kept in that particular county. I suppose we always had agents in that

county since the company has done business in Iowa. The defendant's principal place of business is in New York city. The defendant's principal place of business has never been in Pottawattamie county, Iowa. It has never resided in Pottawattamie county, Iowa. To the best of my knowledge and belief the defendant's policy was not negotiated for through any office at Council Bluffs.

"After the receipt of the application of Frank C. Johnson the defendant company received from said Johnson a writing making corrections in his application for insurance. This writing was received by the defendant January 19, 1891, with a letter from G. A. Smith, from Sioux City, Iowa. I hand this request for a correction to the notary and ask that it be made a part of my deposition as Exhibit 'D.'"

Exhibit "D" above referred to was here introduced and read in evidence by defendant and is in the following words and figures:

EXHIBIT "D."

"New York Life Insurance Company, 346 and 348 Broadway,
"New York.

"COUNCIL BLUFFS, IOWA, *Jan.* 15, 1891.

"The New York Life Insurance Company will please make the following corrections in an application for insurance made by me, dated Dec. 18, 1890, and upon which policy No. 385048 was issued, and for which this shall be held as good and sufficient authority for the making of such corrections.

"The answer to the question No. 2 B should be read as follows:
"Randolph, Iowa, Fremont county."

"FRANK C. JOHNSON."

79 The New York Life Insurance Company hereby acknowledges to have received notice of corrections required in the application above referred to, and such corrections having been made, it is hereby agreed that they shall be considered as forming part of the original application upon which said policy was issued.

WM. H. BEERS, *Pres.*,
Per U. H.

Dated, New York, January 21, 1891.

File with application No. 385048.

"Pursuant to this request for correction of the application the answer to question No. 2 'B,' referred to in said request was corrected on the books of the defendant—I suppose immediately.

"From the time of the correction, as requested in said Exhibit 'D' the post-office address of the said Frank C. Johnson, as it stood upon the books of the defendant, was 'Randolph, Fremont county, Iowa.'

"The book in which appears the post-office addresses is called a

'policy register.' The address of the insured is always given by him over his own signature in his application, and the policy department, upon receipt of said application makes the original entry of the address of the insured in this book. The original is sent to the 'comptroller's department' and kept by them. The record in this case was made in the ordinary course of business, and shows consecutively and continuously the addresses of persons having policies in the defendant company. I believe the said address of said Johnson as therein appearing to be the true and correct address of said Johnson, as given to the defendant by him, on receipt of said Exhibit 'D.' The premiums were paid by Frank C. Johnson on policy number 385048 to November 11, 1893. He did not pay that premium which became due on the 11th day of November, 1893, or any part thereof.

"The defendant received from Johnson a written application,
80 signed by him requesting the defendant to extend the benefits of its 'accumulation-policy plan' to his policy and I hand the original of such request to the notary and ask him to mark it Exhibit 'H.'"

Said Exhibit "H" was here introduced and read in evidence by defendant and is in words and figures the same as Exhibit "A" attached to defendant's answer already set out at page 24 of this record.

"I suppose a certificate was mailed to Johnson by which the benefits of the 'accumulation-policy plan,' were extended to him, immediately.

"Q. You may state whether or not the said benefits of the said 'accumulation-policy plan,' as extended to said policy No. 385048 were in writing? If so, what was done with said writing and when?

"A. No, the benefits were not in writing. The benefits referred to the treatment of the policy, under a particular class of policies supposed to be more liberal in its terms, but probably a certificate, as I say, was sent to him certifying to the fact that said benefits were extended to his policy. Our record shows that a certificate extending said benefits to this policy was mailed to the insured on January 20th, 1893, but I am unable to furnish a copy of it, as no letter-press copy was made at the time, nor can I obtain a printed form like that sent to Johnson.

"Said Frank C. Johnson, nor anybody claiming to represent said policy 385048, ever requested the defendant for a paid-up insurance."

Cross-examination:

"The company had an agent at Council Bluffs in Pottawattamie county, Iowa, by the name of E. C. Smith in 1890, and for several years prior to and after that date, but he was not the general agent of the company in the strict sense of the term, as he had no authority other than that given to any other agent except that he had a 'renewal account.' We distinguish special and general agents by this fact. E. C. Smith is now the agent of the defendant and resides

in Omaha. I observe that the application for the policy in
81 suit is dated and signed at Randolph in the State of Iowa. The company had no agency at Randolph at the date of the application. I presume that E. C. Smith, then located at Council Bluffs, Iowa, solicited and secured this application and put his business through Gilbert A. Smith, manager of our office at Sioux City, Iowa. I do not know who collected the first premium. G. A. Smith was located at Council Bluffs, as agent of defendant at one time. The company keeps a supply of blank forms for assignments of policies and delivers them to its policy-holders for their use and benefit."

Constitution of New York.

The defendant offered in evidence from one of the statutes of New York named in Ex. 9, the extract from section 1 of article 8 of the constitution of New York, set out in paragraph 6½ of its answer as the same is already shown in this record at page 17.

Whereupon the plaintiff objected to same as irrelevant, which objection was sustained and defendant excepted.

The defendant also offered in evidence from the "Session Laws of New York of 1877," it being one of the books mentioned in Ex. 9, sec. 2 of chapter 321, which section is in words and figures as follows:

SEC. 2. "The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

E. C. SMITH.

E. C. SMITH being called by the defendant and duly sworn testified as follows:

"My occupation is life-insurance agent. I knew Frank C. Johnson in his lifetime. The signature upon Ex. 'D' attached to the deposition of Chas. C. Whitney filed in this case, is Frank C.
82 Johnson's signature. It was made in my presence. I saw him write it. The signature upon Ex. 'H' attached to the said deposition of the said Chas. C. Whitney was written in my presence by Frank C. Johnson—the insured named in 385048."

Cross-examination.

Examined by Mr. BREEN:

"Mr. Johnson wrote his name on this Ex. 'D' shown me by opposing counsel, in my presence. My recollection is that it was done at the Midland State bank in Omaha; either there or at my office at Council Bluffs, at the time of the delivery of the policy."

Redirect examination.

Examined by Mr. McIntosh:

"The handwriting in the body of the paper is my own and that is the paper he wrote and gave me at the time I delivered the policy to him—that is my recollection."

Recross-examination.

Examined by Mr. Breen:

"My recollection is that Ex. 'D' attached to Whitney's deposition was written out, and signed by Johnson at the same time and at the same meeting that I delivered the policy in suit to him."

E. C. Smith recalled.

Examined by Mr. McIntosh:

"I am the same E. C. Smith who testified in this case yesterday. I am the same E. C. Smith who took the application of Frank C. Johnson for policy 385048. He paid the first premium on that policy to me. The premium that matured the 11th of November, 1892, on that policy was paid to *to* me. I delivered to him, for the defendant, the renewal receipt that is in evidence here as Ex. '13.'"

Cross-examination.

Examined by Mr. Breen:

"I was at Randolph, Iowa, when I took this application upon which the policy in suit issued. I did not have an office
83 there. My office was then in Council Bluffs, in this county. I forwarded the application when I took it to Sioux City.

"Q. I want you to identify a signature, Mr. Smith. I will show you Ex. '24' and ask you if that is your signature?

"A. That is.

"The handwriting in lead pencil in the body of these Exhibits '25' and '26' which you now show me is mine.

"In 1893 I had my office in Omaha—I think in Omaha.

"Q. You were the general manager of the New York Life Company at that time?

"A. I had the title of manager.

"Q. You had your office on the tenth floor in the New York Lite building in that city?

"A. No, sir, on the third floor at that time.

"Q. You never resided in Omaha?

"A. No sir."

Redirect examination.

Examined by Mr. McIntosh:

"Q. You may just tell, Mr. Smith, how you came to have an office in Council Bluffs, or what connection, if any, your office in Council Bluffs had with the defendant?

"A. I used the office to facilitate my business and do my corresponding and other work in connection with my other business.

"Q. Had you other personal business besides the life-insurance business, or did you have while you had that office?

"A. I had."

Recross-examination.

Examined by Mr. BREEN:

"The policy that was issued to Johnson was sent to me from Sioux City to Council Bluffs. At that time my office was in the Sapp block, I think. I am not positive. Very likely the words 'New York Life Insurance Company' were posted on the door of that office. I expect that the 'New York Life' was on the door, the name. I don't think there was any indication of any other business on the door. My name was on the door, and designated 'agent,' or 'agency territory.'"

84 A. A. DE CELLE, called by defendant and duly sworn, testified as follows:

"I had the general overseeing, superintending, or direction of the company's business in Sioux City, in 1893. This book now handed to me is the 'policy register' which was kept in the Sioux City office. These 'renewal notices,' as they were called, came from the home office of the company in New York, already filled out and we compared them and checked them on this 'policy register' before sending them out."

This witness here detailed the system of comparing, calling off and checking the "renewal notices" with the "policy register" before sending them out, the same as already detailed by the witness, Mrs. Anna Phelps Smith, and testified to observing upon the policy register the check-mark described by the witness, Mrs. Anna Phelps Smith, and detailed the meaning of the various entries and characters upon the line of the book where the Johnson policy, number 385048, appeared, the same as the witness, Anna Phelps Smith had done. And thereupon the defendant offered the entries upon the book pertaining to the Johnson policy number 385048 and the page of the book, number 116, where the said entries appeared, in evidence. Whereupon the plaintiff objected to the offer as being incompetent, irrelevant and because the book was not a book of accounts between the parties and because it was not shown to be correct. Whereupon the court overruled the objections and the book was admitted in evidence to which plaintiff excepted.

The witness De Celle further testified as follows:

"D. W. Corley did not handle any of these 'renewal notices.' He had nothing to do with them."

Rebuttal.

The plaintiff introduced and read in evidence on rebuttal the opinion in the case of *Sands vs. New York Life Ins. Co.* re-
85 ported in 50 "New York Reports," p. 626, etc., which is in words and figures as follows:

Stephania Lucy Sands, Respondent, vs. The New York Life Insurance Co., Appellant.:

(Argued December 18, 1872; decided December 24, 1872.)

"PECKHAM, *J.:*

"Action to recover the amount of a policy of insurance issued by defendant to the husband of the plaintiff on the 28th of January, 1850, then a resident of Mobile, in Alabama; whereby, in consideration of $160 then paid, and of the annual payment thereafter of a like sum during the continuance of the policy, the defendant agreed to insure him in the sum of $5,000 'for the term of his natural life.' Sands died at Mobile in July, 1862.

"It is admitted that all premiums were paid on the policy up to January, 1862; and it is proved and found that the premium due in January, 1862, was paid to one Muldon, the agent of the defendant, at Mobile, appointed prior to our civil war, and through whom this policy was issued; and it was paid in Confederate treasury notes, then, substantially, the only currency of the so-called Confederate States for the general business of those States; and, although not made a legal tender for the payment of debts, it was so used, and was then very generally received at par in payment of debts and for the purchase of property, although it was at a discount for gold of about twenty per cent. This currency was received by Muldon, the general agent of the defendant, as money.

"The defendant now objects to the payment of the insurance upon various grounds. Its counsel insist that the war made the contract void; that the contract was executory, to be *renewed* each year by payment of the premium or it became void; and hence such contract became utterly void by the war; that it was void as requiring commercial intercourse between the States at war; that, at any rate, the agency of Muldon was avoided by the war. Hence, that he had no authority to receive payment of the premium in January, 1862, and certainly not in Confederate notes.

"It is certainly true that all contracts with citizens of Confederate States are not made void by the war.

86 "It is against sound principle, and at war with the lights of the age, that the debts of individuals should be impaired by national differences; debts, be it understood, that existed by virtue of contract made prior to the war, (*Clarke vs. Morey*, 10 J. R., 73).

"This contract of the parties I do not think was nullified by the war. What was it? As presented in the complaint and found by the referee, it is a contract of insurance by defendant for the *life* of the insured for the consideration of so much money received, and

the annual payment of $160 during the continuance of the policy. It was a valid policy 'for the life of the insured,' to become void by the omission to pay the agreed annuity. In principle, I do not see why it is not like a lease or grant of land in fee, reserving rent, to become void if the rent be not paid, if the condition subsequent be not complied with. I do not say that it would bar the plaintiff's recovery if the contract were as the defendant insists it is. It is enough to say that such is *not* this contract. The agreement is to insure for the life of the insured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition *subsequent* not precedent." * * *

The plaintiff on rebuttal also introduced and read in evidence the opinion in the case *Chocn vs. Ins. Co.*, reported in 50 "New York Reports" at page 610, which is in words and figures as follows:

Henrietta Yates Cohen, Appellant, vs. The New York Mutual Life Insurance Company, Respondent.

(Argued September 14, 1871; decided December 24, 1872.)

"ALLEN, *J.:*

"A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided, their appeals might be heard.

"The importance of the questions at issue induced the court
87 to listen to the request, and this case was substantially reargued, with *Sands vs. The New York Life Ins. Co.*, in December last. (*Post* page, 626.)

* * * * * * *

"The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made in 1849, and was 'for the term of his natural life,' in consideration of a sum paid at the date of the policy, and the further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from *year to year*, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium. It is expressly declared in the contract of insurance that if the annual payments should not be made, 'that said policy should cease and determine,' and 'that all previous payments made thereon should be forfeited to the company.' It was a life policy. (*Hodsdon vs. Guardian Life Ins. Co.* 97 Mass., 144; *Reese vs. Mutual Benefit Life Ins. Co.*, 26 Barb., 556; *N. Y. Life Ins. Co. vs. Clopton*, 7 Bush. (Ky.) R., 179.) The contract was not, as to all its stipulations and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk in-

curred from *year to year*. The annual premium paid during the first years of a life policy is in excess of the actual risk; and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies upon young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss, the result of advanced age, has been incurred. The contract was a continuing contract in the sense that it was to be performed in the future; but it was not a contract of continuance in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and, in this respect, was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretense that a contract of the latter kind would be dissolved
88 by war. The contract would remain; the remedy would be suspended. The act to be performed by the plaintiff was a single act, to be performed at stated periods, and was not like the contract of partnerships and some other contracts which are continuous in their performance." * * *

WYMAN
vs.
PHŒNIX INS. CO.

The plaintiff introduced and read in evidence, on rebuttal, the opinion in the case of "Wyman *vs.* The Phœnix Life Insurance Company reported in the New York Reports called *the* 'The Supreme Court Reports,'" the book being known as "45 Hun.," and the opinion commencing on page 145 thereof is in words and figures as follows:

DANIELS, *J.*:

"The plaintiff, as the administratrix of the estate of her deceased husband, William A. Wyman, prosecuted this action to recover the amount of $3,000, for which his life had been insured by a policy issued by the defendant on the 25th day of October, 1872. This policy provided for the payment of an annual premium of $123.60 on or before the 25th day of October in every year during its continuance. It was also declared and agreed in the policy that it should be null and void in case any note given for the cash part of the premium on the policy should not be paid at maturity, or in case the interest should not be paid annually in advance on any note which might be given for any portion of the premiums; and further, that if the said premiums shall not be paid at the office of the company in the city of Hartford, Conn., or to an agent of the company on his producing a receipt signed by the president or secretary, on or before the date above mentioned, then in every such case the said company shall not be liable for payment of the sum insured, or any part thereof, and this policy shall cease and determine.

"The annual premium which became due on the policy on the 25th day of October, 1884, was not, at that time, paid, and because of that failure to pay, the policy, by its own terms, was declared forfeited. Policies of this general form have frequently been before the courts for consideration and construction, and where no
89 other circumstance has intervened to relieve the assured, the courts have held the policy to become void on account of such a default. (*Wheeler vs. Connecticut Mutual Life Insurance Co.*, 82 N. Y., 543, 551; *Attorney General vs. Continental Ins. Co.*, 93 N. Y., 70, 73; *Robertson vs. Metropolitan Ins. Co.*, 88 N. Y., 541.) There can be no room for doubt, therefore, that this policy had become null and void, unless it was saved by the intervention of the statute hereafter referred to, from and after the 25th of October, 1884, by the failure to pay the annual premium, and it was not revived or continued in force by the circumstance alone which was proved in the case, that the son of the assured paid the premium on the 10th of November, 1884, as long as the fact was that his father had died on the 8th, and that was unknown to the agent of the company to whom the payment was made. (*Bennecke vs. Ins. Co.*, 105 U. S., 355.)

"On the 3rd of November, 1884, an interview took place at the office of the agency of the company in the city of New York, between the assured and the agent concerning his right to a paid-up policy. They did not agree as to this policy, on account of a difference between them relating to subsequent payments of interest upon the notes held by the company against the assured, and the agent then signed a stipulation extending the time for thirty days in which the assured might reach a conclusion regarding the taking of a paid-up policy. That was at no time determined by the assured up to the period of his decease. This agreement was not made for the purpose, neither did it of itself have the effect of continuing the original policy in force. Its sole object was to allow the assured thirty days for investigation and consideration upon the question whether he would, or would not accept the paid-up policy which the company was willing to issue to him. As to his immediately preceding default in the payment of the premium, no negotiations or agreement were entered into. Neither was the agent himself authorized to give him any indulgence on this subject. What then took place, therefore, in no manner aided or assisted the plaintiff in maintaining this action. As the law stood, before the statute presently considered was enacted, this policy would be avoided by the default in the payment of this premium. But it was proven by the cross-examination of the agent of the company by the defendant's counsel, that Wyman had also made default in the payment
90 of a premium which was due on the 25th of April, 1884. What this premium was has not been very clearly disclosed by the case. *But it is to be inferred from the receipt given on the tenth of November and dated the 25th of October*, 1884, *that it was a quarterly* installment of the premium payable upon the policy, and that its payment was essential, as well as the payment of the entire annual premium, to keep the policy in life. Before this part of the pre-

mium was due, the agent states that the assured requested him to extend the time of the payment of his premium, but he refused to do so, and said 'If I was ever so willing I have no power to extend the time of your payment, but I will hold your *renewal* in the office, I will not return it to the company for four or five weeks, and if you come in and are in good health, I have no doubt we shall accept the premium, but I cannot extend the time. I have no power to and no desire to.' The same witness further testified that he did *after* April take the money, *after* it was due; that the assured came and paid it himself.

"The failure of the assured to pay this premium at the time had the effect, under those provisions of the policy, to forfeit it as the statute referred to did not *then* apply to it, and the agent himself had no right to revive it without the action of the superior officers of the company. * * *

"But it is, nevertheless, to be inferred from the circumstances that the policy was afterwards *reinstated* and up to the 25th of April, 1884, regarded as and was an insurance in force and effect, because of this April premium having been accepted by the company, and the policy in that manner in due form renewed from the time when the payment was made. * * *

"And the result of this renewal was, after that, to place this policy within the control of chapter 341 of the Laws of 1876, and to render it afterwards incapable of forfeiture without the service of a notice of not less than thirty days to the insured, stating the amount of the annual premium, or interest due, and when due on such policy, and the place where such premium or interest might be paid. That such a notice was served was neither intimated nor proved upon the trial. And while this policy was issued, before the enactment of the statute, as long as it was renewed after such enactment, it was brought within its provisions. For it has been made
91 to include not only policies issued after the enactment, but also those which may afterwards be renewed, and this policy, from the evidence, was so renewed. If this term is not to have this effect, then it can manifestly have no application to renewed policies intended to be protected by the statute. And that construction would be opposed not only to its spirit, but also to its language. There was no legislative inability to include within the act such policies as should be renewed and continued in force after its passage. For, while not in form, a new policy after the insurance had become null and *void*, because of the non-payment of the premium and the renewal of it by the acceptance of the money, yet in legal effect the policy would be otherwise, and it must have been so intended by the legislature in making the act applicable to a renewed policy. A prominent purpose which this phraseology must subserve, in the statute, is to include that class of policies that may have become forfeited and void, and are afterwards revived and continued by the action and assent of the company."

JANE JOHNSON.

Being called in rebuttal, by the plaintiff testified as follows:

Examined by Mr. BREEN:

"The insurance envelope, or jacket which enclosed the policy in suit and which you now show me marked Ex. '27' came into my possession with the policy—at the same time.

"Q. Mrs. Johnson I now show you Ex. '1,' being the policy in suit, and also Ex. '16' being the 'accumulation certificate,' Ex. '13' being the receipt for the annual premium on the policy falling due November 11, 1892, and Ex. '24,' being a letter of date May 30, 1893, by Mr. Smith to Mr. Johnson, and these two small papers, called here Exhibits '25' and '26,' and ask you to state whether or not when you received Ex. '27'—the jacket or envelope I have shown you—all these other papers that I have called your attention to were enclosed in it?"

Objected to as immaterial—Court—overruled (Defendant excepts.)

"Q. What other papers or instruments of any description were enclosed in that jacket when you got it from your husband?"

92 Objected to as immaterial—overruled—defendant excepts.

"A. There was nothing more that I know of unless he handed me that what do you call it—a transfer?

"Q. An assignment.

"A. Assignment.

"Q. Which you have already introduced in evidence?

"A. Yes.

"Q. Did you put that in the envelope yourself?

"A. Yes. I put that with the rest of the insurance papers in that jacket so as to have them all together.

"When I received Ex. '27' from my husband it contained no other papers than these exhibits to which you have just directed my attention to wit: Exhibits '25,' '26,' '24,' '16,' '1' and '13.'

"The plaintiff here offered in evidence the Exhibit '27,' being the insurance envelope, or jacket just identified by the witness, and all the other exhibits which were enclosed in it, viz: '25,' '26,' '24,' '16,' '1' and '13,' which have just been identified by the witness, Jane Johnson.

"Exhibit '1' being the policy in suit, Exhibit '13' being the receipt for the annual premium falling due November the 11th, 1892, Exhibit '16' being the 'accumulation certificate' already shown in this abstract, and Exhibits '25' and '26' being two sheets of writing paper, with the following letter-heads endorsed on one

"New York Life Insurance Company, 346 Broadway, New York city; E. C. Smith, manager Central Nebraska.

"OMAHA, —— —, 189–."

and the following letter-head endorsed on the other:

"New York Life Insurance Company.

"Agency at ——, 189–."

The other exhibit here introduced to wit: Exhibit "24" is as follows:

93 EXHIBIT "24."

"New York Life Insurance Company, John A. McCall, president; rooms 313 to 315, New York Life building; E. C. Smith, manager.

"OMAHA, NEB., *May* 30, 1893.

"Mr. F. C. Johnson, city; care of Citizens' bank.

"DEAR SIR: I am glad to at last be able to send you certificate extending benefits of the new accumulation policy to your *yolicy* No. 385048 as I agreed to do last December and I trust with these provisions in addition to what the policy itself guarantees will satisfy you that it is the very best policy ever issued and one that you will feel disposed to continue the premiums on for the next seven years at least.

"I am now located permanently at Nos. 313 to 315 N. Y. Life bldg. and would be very glad to have you call on me whenever you can make it convenient.

"Yours truly, E. C. SMITH, *Manager*."

These offers were objected to by defendant as being immaterial—multifarious—no foundation laid—overruled—exception by defendant.

"Q. Mrs. Johnson, where was your husband's place of business in 1893?

"A. Citizens' bank, 24th and Cuming, Omaha.

"Q. Where was his residence then, the same as where he died?

"A. Yes, sir.

"Q. Do you know when he severed his connection with the Midland State bank? Located at the corner of 16th and Chicago Sts., Omaha?

"A. 16th and California Sts.—I think it was the spring of 1893—I believe it was the spring of 1893.

"Q. Where was his post-office address in the fall of 1893—in the summer?

"Objected to as immaterial—overruled—defendant excepts.

94 "A. Citizens' bank, 24th and Cuming, Omaha."

Cross-examination.

Examined by Mr. McIntosh:

"We lived in Randolph, Iowa, before moving to Omaha. We moved to Omaha in the fall of 1889. My husband's business at Randolph was running a private bank. The name of the bank was 'Randolph bank.' He was interested as owner of the bank, and continued to own that bank up to September, 1895, I think. It was a private banking business on a small scale—small place, town of about 500. There was another bank there. He received mail there while we lived there.

"Q. He received mail at the bank after he moved away, didn't he?

"A. Yes, his bank mail.

"Q. A letter addressed to Randolph would be drawn out by the bank, wouldn't it, and remain there until he came there and opened it and transacted the business.

"A. Yes."

"Q. That he did all the time he was there; all the time he had his bank there?

"A. Yes."

Redirect examination.

Examined by Mr. Breen:

"Letters addressed to the 'Randolph bank' were going there—that is what I said—that letters pertaining to the bank were sent there—addressed to the 'Randolph bank.' He had a man there all the time—a young man named Phalen—he didn't stay there at the bank himself.

"In 1893 and 1894 he had a private desk in the Citizens' bank at Omaha, and he had one there until the bank closed, and transacted all his business there of a private nature."

Recross-examination.

Examined by Mr. McIntosh:

"Mr. Johnson was a stockholder and a director in the Citizens' bank. He retained the bank at Randolph and went back
95 and forth to see how things were going, once in a while—once a month, or something like that. This young man that was in control of the bank there attended to matters generally. The postmaster at Randolph was personally acquainted with my husband. He didn't know where he was all the time, but he knew that he lived in Omaha—knew that was his residence. I presume this young man that was in charge of the bank got all letters of the bank and of Mr. Johnson out of the post-office. This young man did not know where Mr. Johnson was all the time. He knew where he lived and knew where his address was.

"Q. And any personal letter that was gotten from the post-office by Mr. Phalen, he would wait until Mr. Johnson came and got it, wouldn't he, and give it to him?

"A. No I don't know it.
"Q. You don't know that he did not?
"A. I don't know either way about that."

Mrs. JANE JOHNSON recalled—on rebuttal.

Examined by Mr. BREEN:

"Q. Mrs. Johnson you may state whether or not after your husband's death, at my request, or on your own account, you *may* made a search among your husband's papers endeavoring to find a notice such as here in controversy—a notice from the New York Life Insurance Company to Mr. Johnson—addressed to him at any point giving him notice that his premium was due and that they would forfeit his policy, or any such notice; state whether or not you made such search?"

Objected to as immaterial—objection sustained—plaintiff excepts.

Mr. BREEN: Plaintiff offers to show by the witness on the stand that such a search was made.

"Q. Do you know what Mr. Johnson's habits were as to preserving letters and communications generally?
"A. He was very particular to do so—he was very particular in those matters—very particular to save all his papers and letters."

Objected to as immaterial—overruled—plaintiff excepts.

96 "Q. You may now state whether or not you found among the deceased'- papers, or in this envelope marked Ex. '27,' or anywhere among his papers, after his death or before it, after they came into your possession, any notice or communication from the New York Life Insurance Co., such as the notice here in controversy, or any other notice, other than those which you have identified and which have been introduced already and found in this envelope?"

Mr. MCINTOSH: Defendant objects to the question as immaterial, and for the further reason that the statute of New York does not require that the insured shall receive a notice, but that merely the defendant shall mail it.

COURT: "Under this evidence that we have here before the court now the question is presented in an entirely new light. I am of the opinion that this evidence ought to be admitted in the present state of the record. Overruled—defendant excepts.

"A. No.
"Q. Now I repeat, for the purpose of making up the record, the question formerly asked you of whether or not you made search among the papers of the deceased in an endeavor to find such a notice or letter?"

Objected to as immaterial—overruled—defendant excepts.

"A. I did; a very thorough search."

Cross-examination.

Examined by Mr. McIntosh:

"When we first moved to Omaha, in 1889 we lived at 216 N. 22nd St., and that is where we resided up to my husband's death, and yet. After we were in Omaha a while—perhaps a year or two, my husband was in business in the Midland State bank at 16th and California Sts. Possibly, that was before this policy was written. He sold his interest in that bank either in the spring of 1892 or in 1893—I cannot be positive—and moved his business then to the Citizens' bank, corner of 24th and Cummings St., and he continued there until the bank closed in the fall of 1895. He
97 was the exclusive owner of the Randolph bank. He was vice-president awhile in the Citizens' bank."

Saving Clause.

The plaintiff here introduced, upon rebuttal, section 291 of chapter 690 of the "Laws of New York, 1892," it being one of the books named in Exhibit "9" which section designated "saving clause" is in words and figures the same as already set out in the "reply" of plaintiff at page — of this abstract.

The plaintiff here offered in evidence from the said "Laws of New York, 1892," it being one of the books named in Exhibit "9," section 88 of chapter 690, designated "the insurance law," which section is in words and figures as follows:

"Sec. 88. Surrender value of lapsed or forfeited policies.—Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mor-ality at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy; either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time under the same conditions, except as to payments of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand herein-
98 before required to be made to prevent the forfeiture of the policy.

"The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American experience table of mortality with interest at the rate of four and one-half per cent. per annum after deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing.

"The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve computed according to the rule prescribed in this section after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation. If the reserve upon any endowment policy applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survived that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued; this section shall not apply to any case where the provisions of the section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued."

Surrebuttal.

E. C. SMITH.

The defendant here recalled E. C. SMITH in surrebuttal who testified as follows:

"Q. Mr. Smith do you know when Frank C. Johnson applied for the insurance in question, where he resided?"

Plaintiff objects—not proper surrebuttal—immaterial, irrelevant. Objection sustained—defendant excepts.

99 "Q. Mr. Smith did you know when Frank C. Johnson applied for the policy in question, that he had a place of business in Omaha?"

Objected to as not proper surrebuttal—immaterial and irrelevant. They have had their time on the known post-office address of this man when they introduced their testimony.

COURT: I think this ought to be sustained—defendant excepts.

Mr. MCINTOSH: I offer an affirmative answer.

"Q. What was the character of your agency with the defendant during the year, 1893?"

Objected to as not proper surrebuttal—immaterial.

COURT: I think this ought to have been offered before.

Mr. MCINTOSH: I intended to show by this that he was such an agent of the company that notice to him of the post-office address was not notice to the company.

COURT: I will hear your evidence if that is what you offer it for. (Plaintiff excepts.)

Mr. BREEN: It is incompetent: he is asking the witness to state a conclusion as to what was the character of this agency.

COURT: Yes. He ought to state what he was doing; what was the nature of his employment with the company. (Defendant excepts.)

"A. I was solicitor of insurance for the company. I was what was known as a solicitor of insurance. That was my business."

Cross-examination:

"I collected the premiums on this policy. I delivered the policy to Frank C. Johnson. I delivered to him the 'accumulation certificate.' I was designated at Omaha, Nebraska, in 1893 as manager and that was true in the spring of 1893. I think there was upon the door of my office in Omaha, Nebraska, 'New York Life Insurance Company, E. C. Smith, manager.' I guess that was what was on the door and I had in that office under my employment several clerks. We kept books there."

100

Amendment to Ans.

Defendant here asked and obtained leave to amend its answer and thereupon filed the following amendment (omitting formal parts).

"By leave of court first asked and obtained the defendant now comes and for amendment to its answer to the amended and substituted petition herein and says:

"That section 88 of the insurance law referred to in the reply herein is a substantial re-enactment of chapter 347 of the Laws of 1879 of the State of New York, which said law said Johnson agreed in his application to and did therein waive and which waiver was and is stamped in red ink on the face of said policy; that said chapter 347 of the Laws of 1879 of the State of New York is found in volume 3 of the Revised Statutes of New York, edited by Montgomery H. Throop, eighth edition on page 1688; and that therefore said section 88 was also by said application and said policy waived.

"JAMES H. McINTOSH,
"*Attorney for Defendant.*"

The defendant now offered in evidence from one of the statutes named in Exhibit "9," section 347 of the Laws of 1879, of the State of New York which section is in words and figures as follows:

"Whenever any policy of life insurance hereafter issued by any company organized or incorporated under the laws of this State, after being in force three full years, shall by its terms lapse or become forfeited for the non-payment of any premium, or of any note given for a premium, or loan made in cash on the policy, as security, or of any interest of such note or loan, unless the provisions of this

act are specifically waived in the application, and notice of such waiver written or printed in red ink on the margin of the face of the policy when issued, the reserve on such policy, including
101 dividend additions calculated at the date of the failure to make any of the payments above described, according to the American experience table of mortality, and with the interest at the rate of four and one-half per cent. per annum, after deducting any indebtedness of the insured on account of any annual, semi-annual, or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing, shall, on demand made, with surrender of the policy within six months after such lapse, be taken as a single premium of life insurance at the published rates of the company at the time the policy was issued, and shall be applied, as shall have been agreed in the application and policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse, or to purchase upon the same life at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy.

"Provided, that if no such agreement be expressed in the application and policy, the said single premium may be applied in either of the modes above specified, at the option of the owner of the policy; notice of such option to be contained in the demand hereinbefore acquired to be made to prevent the forfeiture of the policy. Provided, also, that the net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the company."

Both parties here rested.

Whereupon the defendant moved the court to instruct the jury to return a verdict for it as follows:

"The defendant now moves the court for an instruction to the jury to return a verdict for the defendant for the reasons following, to wit:

"1st. That on the plaintiff's own evidence no *prima facie* case has been made out, but, on the contrary, the plaintiff's evidence
102 itself shows that there was no policy on the life of Mr. Johnson at the time of his death, and that the policy in question had long before that expired.

"2nd. That the testimony as a whole is uncontroverted to the effect that there is not only no ground for recovery here, but that the testimony affirmatively shows that at the time of Mr. Johnson's death there was no policy on his life with the defendant.

"3rd. That the testimony in writing conclusively shows that whatever policy Frank C. Johnson ever had with the defendant certainly had expired by limitation on the 11th of May, 1896, and the evidence being that at a time subsequent to that he had no policy with the defendant at the time of his death.

"4th. The general reason, that there is no evidence here tending to show or support the allegations of plaintiff's petition, but that all evidence undisputed clearly supports the allegations of the defense averred in the defendant's answer to plaintiff's amended and substituted petition."

And thereupon the plaintiff moved the court as follows:

"And the plaintiff moves the court to instruct the jury in this case to return a verdict for the plaintiff in the sum of $25,000.00 with interest on said sum at the rate of six per cent. from Feb'y 23d, 1897, less the sum of $3,615.00 premiums due, which the undisputed proof shows was tendered to the company on the 20th day of Feb'y, 1897, at its home office in the city of New York, for the reason that neither the pleadings nor the proof in the case constitute any defense against the plaintiff's claim."

Ruling on Motions for Instructions.

After argument at length, upon these motions the court ruled as follows:

"Both plaintiff and defendant have moved the court to instruct the jury to find a verdict in favor of the respective parties so moving. Defendant's motion, having been made first, will be first considered.

103 "There is no dispute under this evidence but that the defendant issued the policy in question to the plaintiff's husband; that he paid the premiums up to and including the one due on the 11th day of November, 1892; that about the 20th day of January, 1893, the defendant issued to plaintiff's husband an accumulation certificate or policy which was accepted by him, and that some time in September, 1896, plaintiff's husband died and thereafter the plaintiff made and presented to the defendant due proofs of loss.

"The question to be determined by the court is, whether the undisputed evidence in this case shows, as is claimed by the defendant, that at the time of the death of the plaintiff's husband this policy was not in force. If it was not in force at that time, it was because it had been either forfeited and had become void under some provision contained therein, or because it terminated by reason of some provision contained in the accumulation policy. The policy as originally issued terminated only upon the death of the insured, unless, as before stated, it became forfeited and void by reason of some failure to comply with its provisions.

"It is insisted on the part of the plaintiff that the evidence in this case fails to show that the defendant company complied with the statutes of the State of New York with reference to forfeiture, and that, by reason thereof, the policy in suit never was forfeited. Before this question is considered by the court, notwithstanding it is the question upon which nearly all the evidence has been introduced, and the one upon which the greater part of the argument has been made, it ought to be determined whether or not this policy terminated by reason of the provisions contained in what is called

the accumulation policy, which was issued to the insured on the 20th day of January, 1893.

"As a foundation for the discussion of this question it is necessary to consider what was in fact the contract between the parties. The original policy contained this provision:

"'If any one of the premiums is not paid as hereinafter provided, on or before the date when due, then this policy shall become void, and all payments previously made shall remain the property of the company.'

104 "If a forfeiture of this policy was made, it must have been made under this provision which I have quoted. There is, I might mention, another provision contained in the application which is somewhat inconsistent, if not entirely inconsistent, with this provision; but, under all circumstances of the case, I do not deem it necessary to give any attention to that provision.

"The most important question to be determined by the court is, whether the provisions of the accumulation policy, which was subsequently issued to the deceased, and accepted by him, conflict with the provisions of the original policy and do away with them. In the accumulation policy we find this provision:

"'Non-forfeiture.—After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company, on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or, (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in the said table; or, (3) the policy will be reinstated within the said six months, upon payment of the overdue premium, with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health by a letter from a physician in good standing.' And then follows a table of guarantees if payment of premiums is discontinued, and in the first line of the table appears the following:

"'If the premiums are paid to November 11, 1893, the insurance of $25000.00 will be extended to May 11, 1896, or, the policy may be converted into paid-up insurance of $1825.00.'

"It seems to me so clear as to hardly need discussion or argument that this provision is absolutely inconsistent with the provision contained in the original policy providing it shall be void in case that payment is not made on or before the date when it is due. A policy that is void has no force or effect. But this provision says expressly that such a policy shall be in effect for the

105 full amount thereof up to a certain date. A policy which is forfeited may also be said to have no effect from and after the date when it is forfeited; but this policy was still in effect as before stated. It seems to me to follow irresistably that if this accumulation policy is to be given the force and effect which is contained in these provisions, that all of the provisions contained in the original policy with reference to its being void, and the pay-

ments being forfeited under certain conditions, are done away with entirely. In other words, there is, under the contract which is made between the parties, by virtue of the receipt of this accumulation policy, no way of forfeiting this policy. It is stated in the accumulation policy that it thereby becomes 'non-forfeitable.'

"If this construction of this contract is correct, it follows necessarily that the court does not need to determine the effect of the statutes of New York with reference to forfeiture, if no forfeiture was possible. It is *immaterial* what the statutes were with reference to how a forfeiture might be effected.

"This accumulation policy provided that if the premiums were paid to November 11, 1893, that the insurance of $25000.00 was to be in force to May 11, 1896. It is obvious there would be no difference between such a provision as that and issuing to the insured a paid-up policy for that amount. His situation would be exactly the same, at least so far as the benefits which are provided therein are concerned. Now if this policy terminated *per ipse* on the 11th day of May, 1896, it is obvious that no notice of any kind of forfeiture was necessary, because there could be no forfeiture. The insurance company had simply provided and contracted that the insured should have insurance for the full amount up to May 11, 1896, and that was to be the end of the contract, if the payments were discontinued.

"It is claimed, on the part of the plaintiff, that this accumulation policy could not be set in force except by reason of some forfeiture. But, as I have already stated, there was no forfeiture, there could be none, there was no provision for a forfeiture. By forfeiture we understand ordinarily an appropriation of some consideration that is unearned, to the benefit of the party so taking. If the policy had been treated as absolutely void on the day on which this payment fell due and was not paid, then the insurance company could
106 have been said to have made a forfeiture; because the insured had paid more than was necessary to carry his insurance up to that date, and the insurance company would be appropriating to itself a certain sum of money which it had not earned. But under this provision which is contained in the accumulation policy, instead of appropriating this unearned increment, it provides it shall be applied to an extension of the insurance up to a further date, namely, May 11, 1896, and that at that date it shall terminate.

"Let us consider for a moment the position in which we would find matters if we were to assume that under any circumstances this policy could have been in force on and after the 11th day of May, 1896. If the insured had died on the 10th day of May, 1896, he would have been entitled to the full amount of $25,000, and without the payment of any other sum. He would not have been obliged to have tendered any premium. I think no one would contend otherwise. And why? Because by the provisions of this accumulation policy he had a paid-up policy up to May 11, 1896. If he died on the 12th day of May, 1896, in accordance with the learned and ingenious argument made by counsel for plaintiff, his policy would be suddenly in some way changed from a paid-up policy, his

contract for a paid-up policy would be wiped out, and a new contract would come into force by virtue of which the old insurance stood as it stood before, and the insured would be required to tender to the defendant in this case the amount of the unpaid premium.

"Mr. McIntosh: All for an insurance of one day!

"Court: All for an insurance of one day. But this premium was not owing to them on the 10th day of May, 1896. On the 10th day of May, 1896, the insured, or his representatives, owed the company nothing. He had a paid-up policy to that date. What causes him to be owing this amount at that subsequent date? Why are the provisions of the contract made abrogated? There can be no good reason for this, it seems to me. There was no new contract made at that time. There was no new provision in the accumulation policy for its change. The situation of the parties on the 12th day of May, 1896, was exactly the same as it was before. The
107 contract which existed between them, whatever it was, was the same on the 12th day of May as it was on the 10th or 11th day of May, 1896, and that contract was that the insured should have paid up insurance up to the 11th day of May, 1896, and no more.

"Now it is said that this accumulation policy was a mere extension of the benefits of the premium policy. Had this been true, it undoubtedly would not change the provisions with relation to forfeiture, but instead of so doing it wipes out entirely those provisions, makes new provisions by which no forfeiture is provided for, and adds to all this certain other privileges which will be granted to the insured in case the premiums are continued. I might say in this connection that this very fact that there is a provision in the accumulation policy that the premiums may be continued shows that it did not in fact terminate on the 11th day of May, 1896; but these are the provisions upon which the original policy might be extended, and these must be complied with in order that the extension may be granted. The accumulation policy made no extension of the thirty days' grace which is granted therein. The original life policy was only to be extended upon the continuation of the payment of the premiums under the terms provided for in the accumulation policy.

"It is also urged that all this is contrary to the statute. It is said the statute cannot be waived; that the statute provided for a forfeiture. Grant that it forbids forfeiture. The accumulation policy makes no provision for any, and there was none in my judgment, as I have before stated. Even conceding the force of the objection, there is a great difference among the authorities as to whether a provision may be waived when such a consideration as is set forth in this accumulation policy is granted to the insured.

"The plaintiff in this case has not seen fit to bring suit upon this accumulation policy as joined with the original policy. This fact alone raises a very serious question upon the pleadings, as to whether the plaintiff would in any event be entitled to recover, but I do not care to rest my decision on that ground. The contract between the parties was this original life policy and the accumulation policy

taken together. This accumulation policy provided that the insurance should terminate, in case payments were discontinued,
108 on the 11th day of May, 1896. Payments were discontinued. The decedent died in September, 1896, and under the provisions of the "accumulation policy," his insurable interest had expired.

"There has been much argument in the case with reference to the policy of permitting forfeitures, and some as to the indulgence which ought to be granted to the insured, and it is said that the provisions with reference to forfeitures are construed very liberally in favor of the insured, and very rigidly against insurance companies. They ought, in my judgment, to be so construed. The provisions of the policy and the insurance laws ought to be so construed as to favor the party who in good faith pays his premiums, or endeavors to do so, but is only prevented therefrom by the failure to *receive proper notice*, unavoidable casualty, or some other reason, which would commend him to a court as entitled to its *equitable* consideration. But neither the insurance laws, nor the provisions of the policy, ought to be so construed as to make it an inducement to parties not to pay their premiums, and to require parties, who in good faith continue to pay their premiums and keep up their policies, to make up the loss which is sustained by reason of the wilful default of persons who deliberately conclude *not* to abide by the *conditions* of the policy. The default in this case was not a mere accidental one. There is no evidence that it resulted from any failure of notice. There is nothing in the situation of the plaintiff's intestate, as it seems to me, to commend him to the special consideration of the court. His premium fell due on the 11th day of November, 1893. For nearly three years thereafter he failed to pay his premium or to make any offer of the same, or to do anything which evinced his desire or intention or his wish to keep this policy in force. For this court now to hold that the plaintiff should be paid this insurance would be, in my judgment, simply throwing an unwarranted burden upon parties who have *complied* with their contracts, and putting a premium on or a special privilege upon the failure of the insured to comply with the agreements upon his part.

"The motion to instruct the jury to find a verdict for the defendant must be sustained. The motion to instruct in favor of the plaintiff will be overruled. The plaintiff will be given an exception." (Plaintiff excepts.)

Thereupon the jury under the direction of the court re-
109 turned a general verdict for the defendant to which plaintiff excepted.

At the close of the trial the judge who tried said case, viz: Hon. W. R. Green, and the shorthand reporter who took the testimony in said case, viz: W. E. Butler, Esq., attached to the shorthand notes—the report of the trial—the following certificate, to wit:

"STATE OF IOWA, } ss:
"*Pottawattamie County,* }

"We hereby certify that the above and foregoing is the official report of the trial of the case of *Jane Johnson vs. New York Life Insurance Company*, tried at the November term, 1897, of the district court of said county, commencing on the 3rd day of November, 1897, and the same contain, together with all the exhibits, documentary evidence and depositions identified and referred to therein, all the evidence offered, and also all the testimony introduced, all the objections made by either party, and all the rulings made by the court, and all the exceptions taken by either party, during the trial of said cause, and that the same contain a full, true and complete report of all the proceedings required to be kept under section 3675 of the Code of 1897.

"Witness our hands this 15th day of December, 1897.

"W. R. GREEN,
"*Judge 15th Judicial District of Iowa.*

"W. E. BUTLER,
"*Reporter for the 15th Judicial District of Iowa.*"

Bill of Exceptions.

That a full and complete report of the trial of said case in shorthand notes thus certified as above stated was thereupon at the request of the plaintiff and by order of the court filed in the clerk's office of said district court of Pottawattamie county, Iowa, and the same became and remains a part of the record of said trial.

110 *Motion for New Trial.*

Thereafter on the 15th day of December, 1897, during the said term of said court the plaintiff filed her motion in said case for "judgment notwithstanding the verdict," which motion, omitting formal parts, is in words and figures as follows:

"*First.* Comes now the plaintiff in the above-entitled case and moves the court to enter judgment for her herein for the sum of twenty-five thousand dollars with interest thereon at six per cent. per annum from the 23d day of February, 1897, less the sum of $3615.00, notwithstanding the verdict returned and entered herein, for the reason that the undisputed evidence established the fact that proofs of death of the insured was received by the defendant company at the home office in the city of New York on said 23d day of February, 1897, and that said sum of $3615.00 was tendered to the defendant company at its home office in the city of New York, on the 20th day of February, 1897, in payment of past-due premiums upon said policy with interest thereon, and that the pleadings of the defendant company constitute no defense whatever against the rendition of such judgment, in that they affirmatively show that the notice required by the laws of New York pleaded in plaintiff's peti-

tion was not sent to plaintiff's assignor, nor to her, and that the policy sued upon has never been forfeited:

or,

Second. To enter judgment for plaintiff herein for the sum of twenty-five thousand dollars with interest thereon at six per cent. from the first day of January, 1897, less the sum of $3180.00, with interest on $1060.00 thereof at six per cent. from the eleventh day of November, 1893, and on $1060.00 thereof at six per cent. from the eleventh day of Nov. 1894, and on $1060.00 thereof at six per cent. from the eleventh day of November, 1895, notwithstanding the verdict returned and entered herein, for the reason that the pleadings of the defendant company constitute no defense whatever against the rendition of such a judgment, in that they affirmatively show that the notice required by the laws of New York pleaded in plaintiff's amended and substituted petition was not sent to
111 plaintiff's assignor nor to her, and that the policy sued upon has never been forfeited, and admit the execution and delivery of the policy, the death of the insured, and that all premiums were paid upon said policy up to November 11th, 1893.

JOHN P. BREEN,
Att'y for Plaintiff.

That upon the same day, to wit: December 15th, 1897, the plaintiff filed in said case her motion for a new trial therein which motion, omitting formal parts, is in words and figures as follows:

"Comes now the plaintiff in the above-entitled case and moves the court to set aside the verdict heretofore rendered and entered herein, at the direction of the court, and grant a new trial of this case for the following causes, viz:

"*First.* Because the court erred in peremptorily instructing the jury to return a verdict for the defendant company, upon its motion.

"*Second.* Because the court erred in not sustaining plaintiff's motion to direct a verdict for her.

"*Third.* Because the verdict and decision is not sustained by sufficient evidence.

"*Fourth.* Because the verdict and decision is contrary to law.

"*Fifth.* Because of errors of law occurring at the trial which were duly excepted to, at the time, by the plaintiff.

"*Sixth.* Because the pleadings of the defendant company do not state facts sufficient to constitute a defense to plaintiff's cause of action in that they affirmatively show that the notice required by the law of the State of New York pleaded in plaintiff's amended and substituted petition was not sent or mailed to the insured nor to her, and that the pleadings affirmatively show that the policy in suit was not forfeited at the time of the death of the insured, but on the contrary affirmatively show that the contract of insurance was, at that time, and still is, in full force and effect, and defend-
112 ant's pleadings admit the execution and delivery of the policy

sued upon and the death of the insured and allege no defense of payment.

JOHN P. BREEN,
Att'y for Plaintiff.

That ther-after both of said motions, for "judgment notwithstanding the verdict" and "for a new trial" came on for hearing and determination on the 20th day of December, 1897, it being the 38th day of said term of said court whereupon the following judgment was entered by the court, (omitting formal parts,) to wit:

Judgment.

"Motion for new trial and motion for judgment notwith-ing the verdict submitted and overruled, and plaintiff excepts, and the cause coming on for judgment upon the verdict of the jury heretofore entered herein, and in consideration of said verdict, it is considered, ordered and adjudged that the defendant, The New York Life Insurance Company, do have and recover of and from Jane Johnson, principal, and William C. Johnson, surety, the costs of this action taxed at $— and that execution issue therefore and plaintiff excepts."

Taking the Appeal.

That the appellant herein, Jane Johnson, took and perfected an appeal from the final judgment rendered and entered in this case as aforesaid and from the order overruling her motions for judgment notwithstanding the verdict and for a new trial, by serving notices of said appeal upon the defendant herein, The New York Life Insurance Company, and upon the clerk of said district court and upon said Wm. C. Johnson, surety for costs, upon the 3rd day of January, 1898, and further perfected her appeal by securing, at the same time, to said clerk his fees for a transcript of the record in said case. The aforesaid notice of appeal served upon the said defendant and upon the said clerk was duly filed in the clerk's office of said court upon the 3rd day of January, 1898.

113 *Certificate to this Abstract.*

The foregoing abstract embraces and contains all of the evidence offered and all of the evidence introduced upon the trial of said case, and contains and embraces a full, true and complete abstract of all the pleadings and papers filed therein, and is a complete and correct abstract of all the record and of all the evidence in said case.

JOHN P. BREEN,
Att'y for Appellant.

Assignments of Error.

First. The court erred in instructing the jury to return a verdict for defendant and in entering judgment thereon, in that, according to the undisputed evidence, under the law, the plaintiff was and is entitled to the verdict and judgment.

Second. The court erred in not sustaining plaintiff's motion for direction of a verdict for her, in that the undisputed evidence and the pleadings, under the law, entitled her to the verdict and judgment.

Third. The court erred, as a matter of law, in holding that the so-called "accumulation certificate" constitutes a complete defense to plaintiff's suit.

Fourth. The court erred in rendering judgment for the defendant, in that the judgment is contrary to law.

Fifth. The verdict is not sustained by sufficient evidence, but on the contrary there is no evidence whatever to support a verdict for the defendant.

Sixth. The court erred in not sustaining plaintiff's motion
114 for a judgment notwithstanding the verdict, in that the defendant's answer wholly fails to constitute any defense to plaintiff's cause of action.

Seventh. The court erred in not sustaining plaintiff's motion for a new trial, in that the directed verdict is unsupported by any evidence, pleadings or law.

JOHN P. BREEN,
Attorney for Appellant.

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Erretta—James W. Johnson—page 49—should read William Johnson.

116 And afterwards, on the 4th day of February, 1898, there was filed in said court, by the appellee, an additional abstract

of the record, the same being in the words and figures following, to wit:

In the Supreme Court of Iowa, January Term, 1898.

JANE JOHNSON, Plaintiff, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant, Appellee.

Appeal from Pottawattamie county district court, Hon. W. R. Greene, judge.

John P. Breen, attorney for appellant.
James H. McIntosh, attorney for appellee.

Appellee's Denial of Appellant's Abstract and Additional Abstract.

Denial of abstract.

Now comes The New York Life Insurance Company, appellee herein, by James H. McIntosh, its attorney, and denies that the abstract filed by the appellant herein contains all of the evidence introduced upon the trial of said cause, and denies that it is a
117 complete and correct abstract of all the record, and of all the evidence in said case, and avers that said abstract is incomplete and insufficient in that behalf, in this, to wit:

1. That it contains no part of the testimony of John P. Breen, who was duly sworn, and gave evidence as a witness for the defendant on the trial of said cause.

2. That it does not contain chapter 341 of the Session Laws of New York of 1876, introduced in evidence by the appellee.

3. That it does not show that the notice of waiver of the provisions of section 347 of the Laws of 1879 of the State of New York, printed in appellant's abstract at pages 100 and 101, and of section 88 of chapter 690 of the insurance law of the State of New York, 1892, printed at pages 97 and 98 of said abstract, was printed in red ink on the margin of the face of the policy in question when issued.

4. That it does not contain any one of the several cases of *Wheeler vs. Connecticut Life Ins. Co.*, 82 N. Y., 551; *People vs. Security Life Ins. and Annuity Co.*, 78 N. Y., 124; *Rochner vs. Knickerbocker Life Ins. Co.*, 63 N. Y., 160, each of which was introduced in evidence by the appellee.

5. That it is insufficient and incorrect and incomplete as shown by this additional abstract.

I.

That the testimony of John P. Breen, a witness on behalf of defendant, tended to establish the truth of the allegations of the
118 fifteenth paragraph, of the fourth defense of the defendant to the amended and substituted petition of the plaintiff found on page 23 of appellant's abstract. Appellee cannot here more specifically give an abstract of said evidence, or the substance

thereof, because the reporter's shorthand notes of said evidence have not been transcribed.

II.

Chapter 341 of the Session Laws of the State of New York for the year 1876 introduced in evidence by the defendant, appellee cannot here produce for the reason stated in the last above paragraph and because the book containing the same cannot, so far as appellee knows and believes, be obtained nearer than at the Nebraska State library at Lincoln. Appellee consents, however, that said chapter 341 of said Session Laws may be considered as printed herein and the terms of said law ascertained by reference to any publication purporting to contain the same.

III.

Notice of waiver of the provisions of chapter 347 of the Laws of 1879 of the State of New York, as required by said act (see appellant's abstract, pages 100, 101, 97 and 98), was printed in red ink on the margin of the face of the policy in question when issued, and so appeared when said policy was introduced in evidence in this case. (See appellant's abstract, page 2.)

IV.

119 *Wheeler vs. Connecticut Mutual Life Ins. Co.*, 82 N. Y., 551, offered and read in evidence by appellee, is in part as follows:

* * * * * * *

"(Argued October 14th, 1880; decided November 16th, 1880.)

* * * * * * *

"The learned counsel for the plaintiff seeks to distinguish 63 N. Y., 160, and 64 *id.*, 304, above cited, from the case at bar; but we are unable to perceive any such difference as prevents an application of the principle decided in these cases, and we think that they are directly in point upon the question discussed. Reliance is also placed upon the decisions of this court in *Cohen v. The N. Y. Mutual Life Ins. Co.*, (50 N. Y., 610) and *Sands v. The N. Y. Life Ins. Co.*, (*id.*, 626), to sustain the theory of the plaintiff. Those decisions hold that the occurrence of war between two States forbid and excused the transmission and payment of premiums on the policies then in question from one State to another, and legally excuses their payment; and as the premiums could not be paid as they fell due, they were suspended, and a tender after the termination of the war, with interest, renewed the policies. This condition of affairs arises from the belligerent attitude between the hostile States, which rendered it impracticable to comply with the terms of the contract. War necessarily prevented communication between the citizens of such States; and as it existed without the fault of the insured, in the cases cited, and for that reason no intercourse could be maintained for business purposes, the insured were not in any sense in fault for a failure to comply with the conditions contained in the policies in

question. As it was impossible for either one of the insured to pay the premium required, or to procure any one else to do so upon his behalf, there is no satisfactory reason why he should not be excused. This rule, which is well settled by the law of nations, rests upon grounds of public policy by which contracts between belligerent States are suspended during the war, but are not annulled. This doctrine is founded upon the principle that the State, and not the individual, wages the war. (*Phill. Int. Law*, 666; *Wheat. Int. Law*, (8th ed.)
120 403, sec. 317.) The cases cited are not analogous; for while here the individual can pay or provide for payment through another, in case of war he is entirely helpless to fulfill and carry out the contract, and at the mercy of the government. The authorities of the hostile States have placed it beyond his control, suspended all intercourse, stopped all business relations, and laid a heavy arm upon all communications between their citizens. As there is no ability to fulfill, no means of paying, the justice and propriety of the rule is apparent, while its application in the case at bar cannot be upheld upon any such ground. There is, we think, a wide distinction in principle recognized in the books between inability to fulfill the terms of the contract, where, by the act of two governments, war intervenes and prevents a fulfillment, and where the default arises from a duty or charge which has been assumed by the party, and is capable of fulfillment either by himself or by another on his behalf."

* * * * * * *

People vs. Security Life Ins. and Annuity Co., 78 N. Y., 124, offered and read in evidence by appellee, is in part as follows:

* * * * * * *

"(Argued June 10, 1879; decided September 16, 1879.)

* * * * * * *

"But the further claim is made that these policy-holders although not partners are not creditors, and as such entitled to share in the assets of the company on a footing of equality with other creditors; and this claim must now be somewhat examined.

"It is true that there is no provision in the policy that any portion of the premiums shall be refunded. There is an agreement on the part of the company that upon the payment of the annual premiums, it will pay the stipulated amount at death. There is also the agreement necessarily implied, that it will receive the annual premiums and carry the insurance to its term. The annual premium is not paid solely for an insurance for the year
121 in which it is paid, but as stated by Mr. Justice Bradley, in *New York Life Insurance Company vs. Statham* (93 U. S. R., 24), each premium is part consideration of the entire insurance for life; or as stated by Mr. Justice Strong in the same case, the assured, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whichever of these be the true theory, the agree-

ment is necessarily implied that the company will receive the premiums, and keep the policy in life; and this is not all. The company is the creature of statute, and its mode of action for the protection of the policy-holders is regulated by statute. From the nature of the case, the agreement must also be implied that it will obey the statute, the law of its creation and of its existence; that it will do its business as required by the statute; that it will properly keep and invest its funds, and be in a condition at all times as the statute requires to discharge all it- liabilities. Therefore when it violates the law, fails to keep on hand funds required by law and becomes insolvent, discontinues business, makes it impossible for the assured to pay premiums, and fails to carry the policies, it has broken its engagements with its policy-holders and becomes liable to them on account of such breach. The policy-holders then have a claim for damages, just as they would have if while doing business it had without just cause refused to receive the payment of premiums and to continue the policies in life; and to this effect have, I believe, uniformly been the decisions: (*N. Y. Life Ins. Co. vs. Statham, supra; Fischer vs. Hope Mut. Life Ins. Co.*, 69 N. Y., 161; *Bell's Case*, L. R. (9 Eq.) 706, *Cook's Case, id.*, 703; *Holdich's Case*, L. R. (14 Eq.), 72). These policy-holders are therefore in the same position as any other persons would be who had running contracts of value with the company, which it had broken,—claimants for damages."

* * * * * * *

Rochmer vs. Knickerbocker Life Ins. Co., 63 N. Y., 160, 122 offered and read in evidence by appellee, is in part as follows:

* * * * * * *

("Argued October 7, 1875; decided November 9, 1875.)

* * * * * * *

"The contract of life insurance is *sui generis*. It is one-sided. By a strict observance of the conditions of it, the insured may hold the insurers to their contract, while they have not the power or the right to compel him to remain in contract relations with them longer than he chooses. Thus it differs widely from a lease. For this reason the clauses of forfeiture in policies of life insurance have been construed literally, and on breach of condition the policies have been held avoided in favor of the insurers without demand or other notice of election on their part."

V.

The order of the introduction of the appellee's evidence, as it purports to be given in said abstract, does not conform to the order of the introduction thereof on the trial.

VI.

"Exhibit H," forming a part of the deposition of Charles C. Whitney, referred to on page 80 of appellant's abstract, and printed therein at page 24, as "Exhibit A" attached to appellee's answer,

was offered and read in evidence before the accumulation certificate, identified as "Exhibit 16," referred to at page 56 of the appellant's abstract, was offered, or read in evidence. After the reading in evidence of said "Exhibit H" from Mr. Whitney's deposition, appellee then demanded from appellant the production of the accumulation certificate, which was identified as "Exhibit 16," and is
123 printed in the appellant's abstract, commencing on page 24, as "Exhibit B" attached to appellee's answer. In response to said demand the appellant produced said accumulation certificate, "Exhibit 16," which was then identified, offered and read in evidence by appellee.

VII.

That part of the appellant's abstract, purporting to give the cross-examination of Edward H. Kruger, commencing on page 67 of the appellant's abstract, is incorrect, insufficient, and does not contain the substance of the testimony of said witness on said cross-examination. The following is a true and correct abstract of the said cross-examination of said witness, as the same was made a part of the record in this cause, to wit:

Cross-examination of EDWARD H. KRUGER by JOHN P. BREEN:

Mr. KRUGER: "My employment with the insurance company commenced in July, 1893, and ended in 1894. I took care of policies as they came in, registered them, and that was my daily work, and then the mailing department of the notices was also mine. That is, every month I had them to send out on the 15th or 16th of each month.

"The policy register contained the dates and the names of the insured, and the number of the policy, and the premium. The book where this data was recorded was called the "policy register." We used the policy register as reference book, to see that the notices were copied right.

"I signed Exhibit A on the 16th of October, 1893. I know
124 that because I have my signature there, and have every reason to believe that that is my signature to that affidavit. And for the further reason that I know positively that I signed it at that time, and for the further reason—because we always did do that on every month, on the 15th or 16th of every month, the mailing of those notices, and it was my duty to send those out-- mail them. I positively know that, I signed that and it could not be any other way but that I did send that out, and attach my signature to that, and it was my business to see to it that those went out, and it couldn't be anything else according to my memory except that it was positively sent. I conclude that to be the fact from the fact that this paper is now produced to me with my signature there, and if this paper were not produced, I could, independent of the paper, recollect about signing the paper on the 16th of October. I know that I either signed it on the 15th or 16th. If I hadn't been shown the paper at all, and my memory had not been refreshed to-

day in any way, and I had met you on the street this morning, and you asked me whether or not I mailed a paper such as my Exhibit D, or signed a paper such as Exhibit A, I would have told you 'Yes sir,' I could have told you that it couldn't be any other way. Independent of the custom of the office, I would know that I did. My knowledge would be, and my answer would be that from the custom of the office I knew it.

"My signature is all of my handwriting on Exhibit A. I signed it, and read it over carefully before I signed it. I read a great many of them over carefully. As to recollection of reading this one, I ought to know what I was signing at the time. I couldn't say whether I read that particular one or not. I might not have read it through.

125 "Independent of any memorandum, and of 'Exhibit A,' as far as I can think the notice positively must have been sent. I conclude that from the fact that I see this 'Exhibit A' here today, and when I think it over I think it positively has been sent out by me personally. I know that. I know it to be a fact that I signed all the notices and mailed all the notices, and it couldn't be any other way but that way. When I say it couldn't be any other way I know it was my duty to send them out, and I conclude that because it was my duty to send them out, and for the further reason that I did. I sent those notices out. That was a part of my duty to mail those notices. I couldn't name another man for whom I carried a letter to the post-office on that day. I know that I deposited that in the mails. I do not know who took care of them after that, but I deposited the notices in the mails. I conclude now from the fact of seeing this 'Exhibit A' that I sent upon that day, the 16th of October, 1893, a notice to Frank C. Johnson. Independent of what the paper says I claim to have independent recollection. I know I could, without referring to that paper say that I sent those notices out and mailed them. I couldn't name another man to whom I sent a notice, or at what time I sent the notices, unless they appeared on those lists that you have. The reason why I say that I mailed the notice to Frank C. Johnson on that day is that the affidavit says so, and I also have, as my memory recalls me, I have every reason to believe that it was sent, and I also can say that I did those things, without 'Exhibit A.'

"I was the general mailing clerk. I couldn't name a man to whom I sent a letter on the 17th or 14th of October, or the
126 1st of October. I think I would have to see the record to say that I mailed a notice to a particular man. But I know it could not be any other way.

"I mailed Johnson's letter in the evening on the 15th or 16th, and addressed it myself. Don't remember the act of addressing it. It was not a card. It was a printed sheet with blanks on them to fill out the date the premium became due, and they were filled in, and I addressed the letter according to the policy register, and also according to the policy. The notice was the same as that attached to my 'Exhibit A.'

"I think I have seen 'Exhibit D' before. I have seen the ones

that were the same thing. I have every reason to believe that I saw 'Exhibit D' about the same time the handling of these notices was going on, the 15th or 16th of October, 1893. I did not sign 'Exhibit D,' but could not help but notice it, because I signed this affidavit. The blank notices were all alike. I do not think I filled out the notices personally. I may have mailed the notices at noon. Generally when we closed the office, or at lunch—noon, we would take them. We separated the notices that went to each State. I have no recollection of putting this particular letter addressed to Johnson in the mail box. The notices were all taken to the post-office. The figures on 'Exhibit C,' attached to my 'Exhibit A,' are not mine. I saw 'Exhibit C' about the same time these notices were being made out. I saw it October 16th, 1893. Mrs. Wianand handed it to me. I do not know just exactly whether it is correct, or I do not know any other way that it can be except that it is correct."

VIII.

127 The redirect examination of the witness, Edward H. Kruger, an abstract of which purports to be given at page 69 of the appellant's abstract, is not therein correctly given, but the following is a true and correct abstract of the redirect examination of the said witness, as the same was made a part of the record of this cause, to wit:

Redirect examination:

Mr. KRUGER: "On the 15th or 16th of each month I made affidavits, with exhibits thereto attached, such as my Exhibit A. If any one of these affidavits made at that time were shown me, and I had before me the exhibits thereto attached, and the policy register, I would be able to state from the affidavit, exhibits, and policy register, the name and address of persons to whom I sent notices that month.

"When I signed the affidavit on the 16th of October I knew at that time that I had sent the notices in question, properly filled out to all the persons, the numbers of whose policies appeared in the exhibit attached to the notice.

"At the time I sent the notice in question I knew that it was filled out with the name, address, and amount of premium due, and the date of the maturity of it, as the name, address, amount of premium, and date of maturity, appeared at that time on the policy register.

"Exhibit C was made out in my presence by Mrs. Wianand from the notices. When I made Exhibit A, I then knew that the numbers of the policies, and amount of the premiums due, as contained in Exhibit C were the same as those on the notices that I had sent."

128 IX.

That part of the appellant's abstract purporting to give the cross-examination of Mrs. Anna Phelps Smith, on page 75, of appellant's

abstract, does not contain a true or correct abstract of said cross-examination, but the following is a true and correct abstract of said cross-examination, as the same was made a part of the record in this cause:

Cross-examination of Mrs. ANNA PHELPS SMITH:

Mrs. SMITH: "The words in the first column of the policy register shown me, the last entry but one on page 116, from which I have been testifying, state the date of the policy. Here is the date it was due (indicating), '11, 11.' That is the 11th month and 11th day. And in the column headed 'number, date' to the left of the name, Frank C. Johnson, the figures 048 are not the complete number of the policy as it looks to you, but to the office force it was complete, because the space being left there indicated that it was a repetition of 385. Therefore the number was 385048. The letter C in the column, a little further on to the right, under the word 'due' means that the policy was cancelled, according to the date over the check-mark 'returned 1-19-'94.' The figures 2-12 indicate that the agent made returns on that policy, that is, sent the premium to the office on the 12th of February."

X.

The printed abstract of the testimony of A. A. De Celle, on behalf of appellee, purporting to be given at page 84 of the appellant's abstract is incorrect, misleading and wholly insufficient. The
129 following is a true abstract thereof, as the same appears as a part of the record of this cause:

A. A. DE CELLE, called by defendant, being duly sworn, testified as follows:

Direct examination:

Mr. DE CELLE: "I am 32 years of age, and reside at Des Moines. I am assistant cashier of the defendant; have been in the employ of the defendant since May, 1892, at Sioux City down to May, 1894, and at Des Moines since that time. I was book-keeper in the defendant's office at Sioux City during October, 1893, in the office of G. A. Smith, manager for the company there. The book you now hand me is one of the policy registers in use in the company's office when we were in Sioux City, and is the same book I sent to you, (Mr. McIntosh,) at Sioux City, for the taking of the depositions of Mr. Kruger, Mrs. Smith and Mrs. Wianand, on October 4th, 1897. Policy 385,048 in the defendant company, under which the plaintiff claims, is registered in this book at page 116. This is the only book kept in our office at Sioux City, or at Des Moines, in which policy 385048, the one in controversy, was registered.

"The first column to the left on page 116 of said register contains the date of policy 385048, to wit, 'November 11th, 1890.' The next entry to the right is the number of the policy, 385048; the next column to the right on said page 116 is the name of the insured,

'Johnson, Frank C.;' and the next column his address, 'Randolph, Iowa;' the next column to the right is the kind of policy; the next column to the right, the amount of the policy, '$25,000;' the next column to the right is the name of the solicitor who obtained the insurance; the next column to the right shows the date of the
130 maturity of the annual premiums, the 11th month and the 11th day, that is, November 11th of each year. The next column to the right shows the amount of the annual premium, $1,060; the next column to the right shows that the premium is payable annually; the next column to the right shows the date on which the first premium was received at our office, 'February 11th, 1891,' and the next entry to the right indicates when the next premium was received at our office, 'May 13th, 1893,' but the book does not show, and we could not tell from it when any premium was actually paid by Mr. Johnson. The premium was collected by E. C. Smith. The next column to the right, containing the word 'returned,' shows that the renewal receipt for the 1893 premium was returned to the home office for cancellation on the date there stated, January 19th, 1894.

"A 'renewal receipt' is a form of receipt made out at the home office, calling for the premium on a certain policy, giving the date due thereof, and the manner in which the premium is paid, whether annually, semi-annually, or quarterly, the same being sent to the branch office for collection, and when paid, countersigned by the manager.

"I saw the renewal notices, the numbers of the policies they referred to, and the amount of the premiums due on said policies, which appear in 'Exhibit C,' attached to Kruger's 'Exhibit A,' and which is in evidence in this case as 'Exhibit 21,' after they were filled out, and before they were passed to Mrs. Wianand, for the purpose of making said 'Exhibit C' attached to Kruger's 'Exhibit A,' for I checked said renewal notices off with the policy register from which I have just been testifying, Mrs. Smith, then Anna Phelps, assisting me.

131 "We checked over these renewal notices that we sent out in the month of October, 1893, by my taking the notices and calling off first the number of the policy, then the name of the insured, his address, date due of the premium, and the amount of the premium. I called this off from the renewal notices. As I called them off Mrs. Smith had before her the policy register of the policy the number of which I called out, and as I called off said data from the renewal notice she watched the register, and if she found that the said data as I called it off corresponded with the data on the policy register, she made a check-mark on the register. The purpose of making this check-mark was in order to prevent mistakes, and in order also to show that we had received the notice in the office for transmission. The check-mark in lead pencil over the word 'returned' on the registry of policy 385048, page 116 of the policy register, was made at the time that the notice was received for the premium due November 11th, 1893, after the same was called off to Mrs. Smith, and was made by her, and shows that said notice

was received at the office, and corresponded exactly as to name, address, amount of premium, and date due of the premium, and the number of the policy, with said policy register.

"After the renewal notices were checked up in the manner I have stated I then handed them over to Mrs. Wianand for the purpose of making up 'Exhibit C,' as shown.

"I exercised a general supervision over the sending out of the notices. After giving them to Mrs. Wianand, I did not give them special attention except to see that Kruger was sending them
132 out, and that he was doing his work properly, seeing that he was exercising due care in addressing the envelopes from the notices, sealing them up, stamping them, &c.,—I paid attention to that."

Mr. De Celle was here shown the copy of the notice sent October 16th, 1893, which Kruger purports to have given in his testimony, and which appears on page 66 of the appellant's abstract, and after examining the same he testified that said answer of Kruger, purporting to give a copy of said notice, gave a true copy thereof.

The WITNESS: "From the record of that policy as it appears in the policy register from which I have been testifying, and which is now before me, and from my recollection of the manner of our office in sending these notices, I would say to the best of my knowledge, the notice set out at length in Kruger's testimony was mailed from the Sioux City office to Frank C. Johnson, Randolph, Iowa, on the 16th day of October, 1893, sealed up in an envelope, and stamped with proper postage. My attention to these notices was such, and my supervision over the sending of them was such, that if it had not been sent I should have known it."

Defendant here offered in evidence page 116 of the policy register identified by Mr. De Celle, and asked that the same be received and identified as "Exhibit 23." Whereupon the plaintiff objected to the offer as being incompetent, irrelevant, and because the book was not a book of account between the parties, and because it was not shown to be correct, but the court overruled the objection, and the page was received and read in evidence, as "Exhibit 23."

133 "Exhibit 23," said page 116, showed, among other things, as follows:

Date of policy.	No. policy.	Insured.	Address.	Premium. Date due.	How payable.	Amount of premium.
1890, Nov. 11.	385018.	Johnson, Frank C.	Randolph, Ia.	11-11.	Annually.	$1930.

And in the last column it had a lead-pencil check-mark the same that Mr. De Celle and Mrs. Smith testified that Mrs. Smith put there when she and Mr. De Celle compared the notice in question with the policy register in October, 1893.

Cross-examination by Mr. BREEN:

Mr. DE CELLE: "The check-mark over the word 'returned,' on the registration of policy No. 385048, page 116 of the policy register, was put there by Mrs. Smith. I saw her do it some time between the 10th and 15th of October, 1893. I could not tell the exact date. It was put there the day the renewal notice sent out in respect of the premium due November 11th, 1893, was checked up.

"The renewal notices were made out in the New York office, and sent to us by express. I received them. Mr. Corley was the cashier, in other words, the manager of the office. Personally he had nothing to do with the renewal notices. I mean he did not handle them at all. The 11–11 under the heading 'premium, date due,' on the line on which the Johnson policy is registered, page 116 of the policy register, indicates the date due of the annual premium, the 11th day of the 11th month.

"The renewal notices were made out at the home office in New York, and were sent to Sioux City, for the reason that we could check them off with our records to see that they were correct
134 in every particular,—that the address of the party corresponded with his last known address, and that we might make the proper entries on our records."

XI.

In addition to the testimony given by Charles C. Whitney, as contained in the appellant's abstract, the said Whitney further testified in said cause, as shown by the record herein, as follows, to wit:

Mr. WHITNEY: "The post-office address of the said Frank C. Johnson, as contained in my 'Exhibit D,' was the last post-office address of the said Frank C. Johnson known to the defendant.

"The said Johnson never paid, or offered to pay, the overdue premium, or any part thereof, of that annual premium that became due the 11th day of November, 1893, or any subsequent premium."

XII.

On redirect examination Mr. E. C. Smith testified as follows:

Mr. SMITH: "The general business of the defendant in Nebraska from 1890 to 1897 was under the direction of another person than myself, except the procuring of applications for new insurance. Mr. Ford was the head man in the management of the general business, except the procuring of applications for new business."

135 *Certificate.*

I, James H. McIntosh, do hereby certify that I am attorney in this cause for the defendant and appellee, and that as such attorney I was present at the trial and conducted the defense for the defendant; that the portions of the evidence in this case specifically stated in the foregoing denial of abstract to have been omitted from the appellant's abstract herein, were a part of the evidence offered and received on the trial of said cause; that the foregoing additional ab-

stract is a true and correct statement of all the matters and things therein purporting to be given, and is a full, true, and correct abstract of so much of the evidence in said cause as it purports to give as the same appears upon the record herein.

JAMES H. McINTOSH,
Attorney for Appellee.

Omaha, January 26, 1898.

The appellee hereby states that the actual cost of printing the foregoing denial of appellant's abstract, and additional abstract, was the sum of $22.

I, James H. McIntosh, attorney for appellee, do hereby certify that the foregoing statement of the appellee, that the actual cost of printing the foregoing denial of abstract, and additional abstract, was the sum of $22, is correct, and that as such attorney I actually paid said sum for the appellee for said printing.

JAMES H. McINTOSH,
Attorney for Appellee.

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137 On the 29th day of December 1898 the appellant filed in said court the following abstract in reply:

In the Supreme Court of Iowa, January Term, 1898.

JANE JOHNSON, Plaintiff, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant, Appellee.

Appeal from Pottawattamie county district court, Hon. W. R. Greene, judge.

John P. Breen, attorney for appellant.
James H. McIntosh, attorney for appellee.

Appellant's Reply Abstract.

First.

Replying to appellee's so-called denial and additional abstract, the appellant says that the testimony therein pointed out as being omitted from appellant's abstract, was and is deemed entirely immaterial to a determination of any of the questions in the case
138 sought to be reviewed in this court, but inasmuch as appellee suggests its materiality by pointing out its omission, appellant herein supplies it and now says that it is true, as stated on page two of appellee's abstract, that John P. Breen was called as a witness by the defendant company and being duly sworn testified as follows:

(*Breen's Testimony.*)

I am attorney for the plaintiff. I examined, but not very thoroughly, the laws of New York for the purpose of ascertaining whether or not the laws of Iowa described in the fifteenth paragraph of the fourth division of the defendant's answer to plaintiff's amended and substituted petition, are the same or like the laws of New York. I did not find any provision in the New York statute exactly similar to section 1727 of the Iowa Code, (1897) but there is a law in that State in substance the same as this section 1727. The very act upon which this suit is brought is like this section, but somewhat different in phraseology. I mean section 92 of the insurance law of 1892 and chapter 321 of the Session Laws of 1877. These are the only sections of the New York statutes that I was able to find, in my hurried examination, which are similar in substance to this section of the Iowa Code. I gave the statutes of New York and the decisions of that State what I would regard as a pretty thorough examination with respect to forfeiture of life-insurance policies. I am not able to state that I found everything on that subject. After that search I am not able to find any other statute of that State like section 1727 (Iowa) except the statutes I referred to, but when you ask the question, what laws I found, I don't want to be understood as stating that there are not laws there outside of the statutes of the State—I mean decisions of the courts of the State. I did not find any decision of any court of that State announcing the law as stated in section 1727 of the Iowa Code (1897) except such decisions as were based upon this chapter 321 of the Laws of New York of 1877 and

the Laws of 1892 of that State which have been introduced in
139 evidence. I made no examination whatever of the New York statutes, or of its decisions with respect to fire-insurance law.

I made no examination of the statutes of New York to find whether or not they contained any provision similar to section 1728 of the Iowa Code (1897) entitled "cancellation of policy," for I deemed this applicable only to fire insurance.

I made search of the New York statutes for the purpose of ascertaining whether or not they contained any section similar to section 1741 of the Iowa Code "copy of application" and I found no such statute, but the courts of last resort in that State have frequently held that it is not necessary, in order to sustain a suit at law upon any policy of insurance in that State, to set out in the petition a copy of the application for the policy, and to that extent the law of New York, as pronounced by its courts, is very similar to the provisions of this section 1741 of the Iowa Code.

I did not make any search of the New York statutes to ascertain whether or not they contained any provision like section 1743 of the Iowa Code, entitled "conditions," for the reason that I regard that section applicable to fire insurance.

I found both the law of the State of New York, as pronounced by its courts, and as provided by its statutes, to be somewhat similar to section 1750 of the Iowa Code, entitled "who deemed agent."

There is no statute of New York, in terms, exactly like this section 1750 of the Iowa Code.

I am unable to state definitely whether or not the New York statutes contain any provision similar to section 1789, entitled, "insurable interests, insurable age, beneficiaries, assignment of policy." I found, as I recall it now, a statute of that State placing a limitation upon age in the insurance laws, but I found no statute precisely like this section 1789.

I am unable to state whether or not the New York statutes contain any section like 1813 of the Iowa Code entitled "misrepresen-tion of age." I did not examine as to that at all.

140 I did not find any statute of the State of New York like section 1819 of the Iowa Code, entitled "copy of application," but with respect to the last provision of section 1819 of the Iowa Code, the courts of New York have held that it is not necessary to enable plaintiff to maintain suit on an insurance policy to plead or prove, upon the trial, the application upon which the policy issued, and in that respect the laws of New York, as pronounced by its courts, are similar to this section 1819, and that is the only similarity which I found between the laws of that State and this section.

Second.

That is also true, as pointed out on page two of appellee's said abstract, that appellee introduced in evidence chapter 341 of the Session Laws of New York of 1876 which is in words and figures as follows:

Session Laws of the State of New York, Ninety-ninth Session.

1876.

CHAP. 341.

An act regulating the forfeiture of life-insurance policies.

Passed May 15, 1876.

The people of the State of New York, represented in senate and assembly, do enact as follows:

Notice to assured required.—SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post-office address, not less than thirty days nor more than sixty days next before such payment becomes due, according to the terms of such policy.

141 Proof of service.—No. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured provided for in section one, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

No. 3. This act shall take effect immediately.

Third.

It is true also, as stated on page three, paragraph three of appellee's said abstract, that the waiver described in said paragraph, was printed in *red* ink on the margin of the face of the policy in suit when the policy was issued and so appeared when the policy was introduced in evidence, instead of in *black* ink as it appears on page two of appellant's abstract where the policy is copied.

Fourth.

As to all modifications, corrections and additions to the evidence made by appellee in its "additional abstract" appellant says they do not change, in any material respect, appellant's abstract of the record, nor add thereto any new matter material to a determination of this case in this court, and may be treated as correct.

Appellant further states that the verdict rendered in this case was rendered and filed upon the 13th day of December, 1897.

Reaffirmance.

And now appellant says that her original abstract filed herein together with appellee's abstract now on file together with this reply abstract of hers now filed, contains all the evidence intro-
142 duced and all the evidence offered upon the trial of this case and that said abstracts together contain a full, complete and correct abstract of all the record of the trial of said case.

JOHN P. BREEN,
Attorney for Appellant.

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144 And said cause was duly submitted to said court at the January term, 1899, thereof on the foregoing record, and after due consideration said court did on the 8th day of April 1899, file its written opinion (decision) the same being in the words and figures following, to wit:

145 In the Supreme Court of Iowa.

JANE JOHNSON, Appellant,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Appellee.
} Opinion—Judgment. Filed April 8, 1899.

Appeal from Pottawattamie district court.

Action to recover upon a policy of life insurance. There was a trial by jury. At the close of the plaintiff's case, under direction of the court, a verdict was returned in defendant's favor. From the judgment rendered thereon, plaintiff prosecutes this appeal.

John P. Breen, for appellant.

James H. McIntosh, for appellee.

WATERMAN, *J.:*

There is little controversy between the parties as to the facts; none as to the following matters: On December 27, 1890, the defendant company issued to one Frank C. Johnson, its policy of insurance on his life for the sum of twenty-five thousand dollars. This policy was assigned to plaintiff in the year 1895, and on September 28, 1896, Johnson died. The annual premium provided for in the contract was one thousand and sixty dollars, and it was payable in advance on the 11th day of November, in each year. The policy contains the usual provisions for forfeiture in case the premiums are not paid when due. Johnson paid the premium due

on November 11, 1892, and thereafter made no payments. After Johnson's death and on the 20th day of February, 1897, plaintiff tendered to defendant the amount of the past-due premiums, with interest to that date which it declined to accept. Thereafter
146 this action was brought. The defendant company was duly incorporated under the laws of the State of New York, and the policy was issued in that State, and by the terms of the application, the contract was to be construed by the laws thereof. It was therefore a New York contract, Wayman *v.* Southard, 10 Wheat. 48; Bank *vs.* Hume, 128 U. S. 195 (9 Sup. Ct. Rep. 41).

II. Plaintiff claims that the policy in suit was not forfeited by the failure of the assured to pay the premiums which became due after November 11, 1892, and before Johnson's death, for the reason that at and prior to the time of the issuance of such policy there was in force in the State of New York a statute (Laws 1877, c. 321, section 1) which provided: "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest or any portion thereof except as hereafter provided." We shall not set out the law in terms. It is enough to say that after default, in order to declare a forfeiture, it requires the company to mail a written or printed notice to the assured, at his last known post-office, stating the amount due, and the place where, and the persons to whom, it is payable, and, further, that, if the amount due is not paid within thirty days after mailing the notice, "the policy and all payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of this policy, in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case
147 be forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and if not paid, the policy and all payments thereon will become forfeited and void, served in the same manner herein provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice hereinbefore provided for." In Baxter *v.* Insurance Company 119, N. Y. 424 (23 N. E. Rep. 1049), the court, in speaking of this statute and its effect upon a policy of life insurance issued under it, said, "This statute was a part of the contract in question, and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case the defendant was claiming a forfeiture of the policy for non-payment of the premium when due. It was not shown that the notice required by law had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice (the one required by statute) had been served or not. It is obvious that this statute,

when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy are not then dependent upon payment of the premium on the day named therein, but upon the payment within thirty days after the notice had been given. * * * The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served, the assured was not in default, because payment within thirty days after *after* notice is to be taken as a full compliance with the conditions as to payment of premium. * * * Before defendant could raise any question in regard to the non-payment of the August premium, it was necessary to show that it had complied
148 with the statute by serving the notice, as this step was essential in order to put the assured in default, or to raise any point based on his omission to pay the last quarterly premium." See also De Frece *v.* Insurance Co., 136 N. Y. 151 (32 N. E. Rep. 556); Phelan *v.* Insurance Co., 113 N. Y. 147 (20 N. E. Rep. 827). In Griffith *v.* Insurance Company 101 Cal. 627 (36 Pac. Rep. 113), the same statute is considered, and the interpretation given it by the courts of New York is adopted. We do not understand that the general principles announced in these cases are disputed by appellee. Its contention is that they have no application to the contract here involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died. Several further defenses are urged, but the conclusion we reach on the one just stated renders it unnecessary that we consider the others.

In order to present intelligibly the points made by the parties and particularly by appellant, it may be well to say something further as to the statutes of New York on the subject of life insurance, and with relation to some other terms of the policy in suit. There was in force in that State, when this contract was made, a statute which we shall style the "net-reserve law," giving to holders of life-insurance policies, which had been in force three full years, the benefit of the "net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default, in this way: the reserve on such policies, "computed according to the American experience table of mortality, at the rate of four and one-half per cent. per annum, shall on demand made, with surrender of the policy within six months after such lapse or forfeiture,
be taken as a single premium of life insurance at the
149 published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy either to continue the insurance of the policy in force at the full amount so long as such single premium will purchase temporary insurance for the amount, at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance." * * * Laws 1879, chapter 347, section 1; Laws 1892, chapter 690, section 88. By the terms of the statute these provisions could be waived by a proper indorsement on the policy. Such an indorsement was made on the policy in suit, in these words: "Notice.—In consideration of the stipula-

tions in case of lapse specified in the policy, the provisions of chapter 347, of the Laws of 1879 of the State of New York have been waived in the application for this policy." According to the terms of the original policy in suit, in case of lapse or forfeiture thereof after the payment of three full premiums, the insured was entitled to a paid-up policy, the amount of which was to be estimated upon a certain basis, as therein stated.

III. We now come to the change made in the contract by which, as appellee claims, it was converted into a non-forfeitable, paid-up policy for a certain fixed term. On December 10, 1892, Johnson, in writing, requested defendant to extend to his policy "the benefits of its accumulation policy." In response to this, the company issued and delivered to him a policy or certificate, the material part of which, so far as concerns the issues here, is in these words:

"New York Life Insurance Company, 346 Broadway, New York.

"This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. 150 Johnson, the benefits of the accumulation-policy plan of the New York Life Insurance Company are hereby extended to said policy, as stated on the next page. It is understood and agreed that, except as herein expressly modified, the terms of said policy, No. 385,048 remain unchanged. * * * This policy is not subject to any conditions or restrictions as to travel, residence, occupation, or manner of death. After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: 1. The insurance will be extended for the face amount, as provided in the table below; or 2, on demand made within six months after such non-payment of such premium dues with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or 3 the policy will be reinstated within the said six months upon payment of the overdue premium, with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing.

"*Table of Guaranties if Payment of Premiums is Discontinued.*

"Provided there is no indebtedness against the policy.

"(Pursuant to the insurance law (chap. 690, Laws of 1892) of the State of New York.")

If the premiums are paid—	1. The insurance of $25,000 will be extended—	Or (2.) The policy may be converted into paid-up insurance—
To Nov. 11, 1893.....	To May 11, 1896.....	Of $1,825
" " " 1894.....	" Jan. " 1899.....	" 3,045
" " " 1895.....	" Aug. " 1901.....	" 4,225
" " " 1896.....	" do. " 1903.....	" 5,250
" " " 1897.....	" do. " 1905.....	" 6,175
" " " 1898.....	" May " 1907.....	" 7,125
" " " 1899.....	" Feb. " 1909.....	" 8,075
" " " 1900.....	" Aug. " 1910.....	" 9,000
" " " 1901.....	" Jan. " 1912.....	" 9,750
" " " 1902.....	" May " 1913.....	" 10,500
" " " 1903.....	" June " 1914.....	" 11,175
" " " 1904.....	" July " 1915.....	" 11,825
" " " 1905.....	" July " 1916.....	" 12,400
151		
To Nov. 11, 1906.....	To June 11, 1917.....	Of 12,900
" " " 1907.....	" M'ch " 1918.....	" 13,250
" " " 1908.....	" Nov. " 1918.....	" 13,700
" " " 1909.....	" July " 1919.....	" 14,025

"Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extend- insurance, or reduced paid-up insurance on the same basis as that on which the above table is constructed."

What was the effect of this new contract? If it converted Johnson's policy into a contract for paid-up insurance, then no notice was necessary. The notice is for the benefit of the assured. It would avail him nothing, when no act of his would enable him to continue the policy in force. The language of the statute is plain enough on this point. Notice is required only as a basis for declaring a forfeiture or lapse of a policy for non-payment of premium or interest. Where the term expires for which the risk is taken, there is neither a forfeiture or a lapse. Looking now to the language of the accumulation certificate, we find that its provisions were to become a part

of the contract between these parties; that the clause of the original policy providing for its forfeiture for the non-payment of premiums was so far modified and changed that upon such failure the policy became a paid-up contract for the amount of the original insurance for a certain and definite term. On demand of the assured within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's life contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11, 1893, became transmuted into a paid-up policy for a
152 term ending May 11, 1896. But appellant argues that the accumulation certificate gave to the original policy nothing but what was bestowed by the net-reserve statute, mentioned above, upon all policies in which its benefits are not waived, and that the notice law would apply in such cases; and it is said the benefits of the net-reserve statute were not all waived here, because of the express reservation in the contract, to which we have referred by which the assured was entitled, upon default to a paid-up policy. We do not think the provisions of this net-reserve statute had the effect to dispense with the notice, but there is a material distinction, which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation certificate to a prior policy. The benefits of that statute were given only to policies which had lapsed or been forfeited for non-payment of premium, debt, or interest; and the notice had to be given, to effect this forfeiture or fix such lapse. After the default the life contract continued in force until it was determined according to the statute. In such case, if the assured died after default, but before notice his beneficiary would be obliged to pay the past-due premiums, in order to recover. In the case at bar, under the modified contract, immediately on default in payment of the premium of 1893 the policy became a paid-up contract for a term; and, if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force. It went into effect by reason of the contract. It is true that plaintiff could have reinstated the life contract on payment of the defaulted premium within six months, and upon proof of health; but he did not do this and therefore, the term policy, which began immediately on the
153 default, was never altered or annulled. Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy without any further payment being required of her. But, on defendant's theory, if he had died on May 12, one day after the term had expired, he could still recover, but, in order to do so, would have to tender all past-due premiums. This payment would thus be required for a single day's insurance. Counsel for appellant responds to this with a counter-illustration. He does not

deny this anomalous feature of the contract, as he claims it to be, but says that if Johnson had lived until May 12, 1896, and then tendered the amount due for premiums, he would have saved his life contract. This, he asserts, shows an inconsistency in the interpretation given by the trial court to the contract. As counsel thinks, this was holding that "the policy was good if Johnson lived but no good if he died." Whatever right Johnson had to reinstate the life contract after his default in the payment of premiums was given him by his new policy. The life policy could have been revived in such case, not because the term insurance had not gone into effect, nor because the character of the contract had not been changed in its terms, but for the reason that, by a provision of this very agreement, the old contract might, under *under* certain circumstances, be made to supersede the new. We do not think he possessed any such right after the expiration of six months from the time of his default in the payment of the premium. The life contract did not continue alive and in force after such default. A prescribed act, within a certain time, on the part of the assured, was required, to give it vitality; and this act was never performed. In the mean-
154 time, without affirmative action of either party, the term insurance went into effect. Answering an argument of counsel for appellant, we will say that we do not think the accumulation certificate has any added force or virtue because it was separately issued. The contract would have been the same, and the rights of the parties not different, if the terms of that interest had been incorporated in the original policy. As counsel construes the notice law, the assured cannot be deprived of the terms most favorable to him, in a policy containing a provision for alternative benefits, without notice being given him. But this is not law. The notice is required only when it is sought to declare the contract forfeited or lapsed. Neither was done here. We do not regard the waiver in the policy of the benefits of the net-reserve law as of any special significance, though appellee in argument, claims something for it. Our holding would be the same if no such waiver had been made.

Our conclusion is that this was a policy for a term that expired before Johnson's death, and therefore plaintiff has no right of recovery. The other questions discussed are rendered immaterial by this finding. Affirmed.

155 And on the same day said supreme court rendered a final judgment in said cause, the same being duly entered of record as follows.

"JANE JOHNSON, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY. } Appeal from Pottawattamie District Court.

In this cause, the court being fully advised in the premises file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be and it is hereby affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $91.75 and that execution issue therefor."

155½ And afterwards there were filed in the office of the clerk of said court the following papers, to wit:

April 4th, 1901, a petition for writ of error, and assignment of errors, and the writ. April 5th, the citation, and April 6th a bond duly executed and approved. Said petition, assignment of errors, writ, bond and citation are hereto attached in original form as a part of this transcript and true copies thereof have been retained and lodged in the office of said clerk.

156 *Certificate.*

STATE OF IOWA, } ss:
Polk County, }

I, C. T. Jones, clerk of the supreme court of the State of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and of the opinion and final judgment in a cause in said court, wherein Jane Johnson was plaintiff and appellant and The New York Life Insurance Company was defendant and appellee, as fully as the same is of record and on file in my office.

I further certify that the annexed petition for a writ of error, writ of error, citation, and assignment of errors, are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error, citation, and assignment of errors, with the indorsements thereon, and that a true copy of the cost bond given is hereto attached.

In testimony whereof I have hereunto set my hand and the seal of said court, at Des Moines, Iowa, this 20th day of April, 1901.

C. T. JONES,
Clerk of the Supreme Court of Iowa.

[Seal of the Supreme Court of Iowa.]

157 Filed Apr. 4, 1901. C. T. Jones, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

JANE JOHNSON, Plaintiff, Appellant,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant, Appellee.
} Petition for a Writ of Error.

To the Honorable Josiah Given, chief justice of the supreme court of Iowa:

Your petitioner, Jane Johnson, respectfully shows—

1. That on the 8th day of April, 1899, a judgment was rendered

against her in the above-entitled cause and by the said supreme court of said State.

2. That said judgment was final.

3. That said supreme court was and is the highest court in said State in which a decision in the said case could be had.

4. That in the pleadings in said case the plaintiff, the said Jane Johnson, set out certain laws and certain provisions of the statutes of the State of New York, upon which, in connection with the contract pleaded, she based her cause of action and right of recovery and claimed the right to have such New York laws and statutory provisions applied and enforced and given full faith and credit in her said case by the said supreme court of Iowa; that said New York laws and statutory provisions were duly pleaded, proved and given in evidence at the trial and on the hearing of said case in said supreme court.

5. That there was involved in and necessary to the determination of her said cause, the question of the effect, faith and credit to be given the said laws and statutory provisions of the State of New York and that a decision of such question was necessary to the said judgment given by the said supreme court.

6. But your petitioner respectfully claims that full faith and credit was not given the said laws and statutory provisions of the State of New York in the determination of said case as is required by
158 sec. 1, of article 4 of the Federal Constitution and claims that that faith and credit required by said sec. 1, article 4, of the Federal Constitution and by sec. 905, chap. 17, of the Federal Statutes, was denied these New York laws and statutory provisions by said judgment.

Wherefore, petitioner prays the allowance by your honor of a writ of error to remove the record and proceedings in the said case into the Supreme Court of the United States for its revision thereof, and for a citation directed to the said, The New York Life Insurance Company, for its appearance in the said Supreme Court of the United States.

JANE JOHNSON,
By JOHN P. BREEN, *Her Att'y.*

On consideration the prayer of the foregoing petition is hereby granted, and the writ of error and citation allowed in said case.

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

4-3-1901.

[Endorsed:] Filed Apr. 4 1901. C. T. Jones, clerk supreme court.

159 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the January term *term*, 1899, thereof, between Jane Johnson and The New York Life Insurance Company, wherein was drawn in question a right or privilege, set up and claimed under & by virtue of the Constitution of the United States, and the decision of said court was against the right and privilege so set up and claimed, a manifest error hath happened to the great damage of the said Jane Johnson, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before the third day of May, 1901, to the end that the record and proceedings aforesaid being inspected the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this third day of April, in the year of our Lord one thousand nine hundred and one.

Issued at office in the city of Des Moines with the seal of the circuit court of the United States for the southern district of Iowa, dated as aforesaid.

[Seal U. S. Circuit Court, Southern District, Iowa.]

EDWARD R. MASON,
Clerk Circuit Court United States, So. District of Iowa.

Allowed by

JOSIAH GIVEN,
Chief Justice of Supreme Court of Iowa.

Filed Apr. 4 1901

C. T. JONES,
Clerk Supreme Court.

160 Copy.

Filed Ap'l 6, 1901. C. T. Jones, Clerk Sup. Court Iowa.

Bond.

In the Supreme Court of Iowa.

JANE JOHNSON, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } Cost Bond.

Know all men by these presents, that we, William C. Johnson as surety and Jane Johnson as principal are held and firmly bound unto the above-named, The New York Life Insurance Company, in the full and just sum of $200.00 to be paid to the said New York Life Insurance Company, its certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Whereas, lately at a term of the above-named court, and in a suit depending therein between the above-named Jane Johnson as plaintiff-appellant and said, The New York Life Insurance Company as defendant and appellee, judgment was rendered against the said Jane Johnson; and she having prayed for and obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York Life Insurance Company and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, within thirty days from the date of said citation.

Now, the condition of the above obligation is such that if the said Jane Johnson shall prosecute her said writ to effect and answer and pay all costs, if she fail to make her plea good, then the above obligation to be void, otherwise to remain in full force and effect.

Dated this 6th day of April, 1901.

JANE JOHNSON, *Principal.*
WM. C. JOHNSON, *Surety.*

The above bond approved by me.
Ap'l 6, 1901.
JOSIAH GIVEN,
Chief Justice of Supreme Court of Iowa.

I C. B. Hatton do hereby certify that I am the duly elected, qualified and acting clerk of the district court of Iowa, in and for Fremont county Iowa; that I am acquainted with the surety on the within bond, William C. Johnson and deem him to be good and sufficient security for the amount of the within bond and do approve of him as surety on the within bond.

[SEAL.]

C. B. HATTEN,
Clerk of the District Court of Fremont County, Iowa.

161 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the New York Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of Iowa, wherein Jane Johnson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Josiah Given, chief justice of the supreme court of the State of Iowa, this 3rd day of April, in the year of our Lord nineteen hundred and one.

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

Filed Apr. 5 1901

C. T. JONES,
Clerk Supreme Court.

STATE OF NEBRASKA, }
Douglas County, } *ss:*

I, John P. Breen, on oath do say that on the 4th day of April, 1901, I personally served the above citation upon the said defendant in error, The New York Life Insurance Company, and upon its attorney of record in the case mentioned in the citation, Jane Johnson *vs.* The New York Life Insurance Company, and the only attorney appearing of record in said case in either the trial court or the supreme court of Iowa, James H. McIntosh, by delivering to him in person a true copy of the above citation at his office in the city of Omaha, Nebraska.

JOHN P. BREEN.

Subscribed in my presence by the said John P. Breen and sworn to before me by him this 4th day of April, 1901.

[Notarial Seal of Ed. P. Smith, Douglas County, Nebraska.]

ED. P. SMITH,
Notary Public.

162 *Assignment of Errors.*

In the Supreme Court of Iowa.

JANE JOHNSON, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant in Error.

Comes now Jane Johnsons, plaintiff in error, in the above-entitled cause, and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for that purpose, to wit :

1. The court erred in failing and refusing to give full effect, faith and credit to the statutory provisions and laws of the State of New York pleaded and proven in the case.

2. The court erred in failing and refusing to give that effect to the said statutory provisions of the State of New York which, by the law and usages of the courts of that State, they were shown to have in said State of New York.

3. The court erred in holding that the said statutory provisions of the State of New York, as construed and applied in that State, were not a part of plaintiff's contract of insurance, and in holding said contract forfeitable without the sending of the notice provided for in said statutory provisions of the State of New York.

4. The court erred in not reversing the decision of the trial court and in not awarding judgment and execution thereon to the plaintiff in error, in that the answer of the defendant in error set up no defense to plaintiff's right of recovery and because the material facts of the case are not in dispute.

Plaintiff in error, therefore, prays that the judgment in the above-entitled case be reviewed and reversed by the Supreme Court of the United States and inasmuch as the answer of the defendant in error sets up no defense to plaintiff's right to recover and
163 because the material facts of the case are not in dispute, that the said Supreme Court of the United States proceed to a final decision of this case and award judgment and execution for plaintiff in error, or that refusing this the case may be remanded to the supreme court of Iowa, with instructions to enter judgment for plaintiff in error.

JANE JOHNSON,
By CONSTANTINE J. SMYTH,
JOHN P. BREEN, *Her Att'ys.*

Omaha, Nebraska, April 18th, 1901.

Endorsed on cover : File No. 18,133. Iowa supreme court. Term No. 305. Jane Johnson, plaintiff in error, *vs.* The New York Life Insurance Company. Filed April 25th 1901.

No. 87.

Supreme Court, U.S.
FILED
OCT 3 1903

Filed Oct. 9, 1903.

87

In the Supreme Court of the United States.

JANE JOHNSON

vs.

NEW YORK LIFE INSURANCE CO.

ERROR TO THE SUPREME COURT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS AND ON THE MERITS ALSO.

MOTION TO DISMISS DISCUSSED AT PAGE 16.

In the Supreme Court of the United States.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

NEW YORK LIFE INSURANCE CO.,

BRIEF FOR PLAINTIFF IN ERROR.

ERROR TO THE SUPREME COURT OF IOWA.

THE CASE STATED.

Jane Johnson sued the defendant in the District Court of Iowa for $25,000 on an insurance policy which it issued to her husband, Frank C. Johnson, on the 27th day of December, 1890. The policy was assigned to the plaintiff in 1895, and Mr. Johnson died in September, 1896. The policy provides for the payment of an annual premium of $1,060.00, payable on the 11th day of November in each year. It contains the usual provisions for forfeiture for non-payment of premiums when due. Three annual premiums were passed due, according to the due dates *named in the policy*, when Johnson died. But the plaintiff pleads that it was agreed that the contract of insurance was a New York contract and should be governed and construed by the laws of that state; and answering that allegation of the petition the defendant "admits that in the application

for said policy it was mutually agreed that the contract of insurance issued upon said application should be *governed* by the laws of the State of New York; and avers that it was further agreed in said application that the contract contained in said policy and in said application should *construed* according to the laws of the State of New York, and that the place of said contract was and should be the home office of said defendant, in the City of New York, in the State of New York."

The plaintiff, therefore, *founded* her cause of action and right of recovery upon the laws of New York, and alleged in her petition that when the policy in suit issued, and ever since 1877, there was in force in that state what is there familiarly known to life insurance companies as the "NOTICE LAW." This law she copied into her petition and introduced in evidence at the trial, and it reads as follows:

(Laws of 1877, chap. 321.)

"No Life Insurance Company, doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall by duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her *last known* postoffice address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed

agent or other person authorized to collect such premium, within *thirty* days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in *full compliance* with the requirements of the policy in respect to the payment of said premium or interest, *anything therein contained to the contrary notwithstanding;* but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"Provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeted and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

In an amendment to her petition the plaintiff also plead, and at the trial introduced in evidence, certain decisions of the court of last resort of the State of New York construing and applying this "NOTICE LAW," just quoted, and among these the case of *Baxter vs. Brooklyn Life Ins. Co.*, 119 N. Y. Rep., 450, in which case the Court of Appeals of that state said of this notice law:

"These provisions (of the notice law) are to have full effect, *any condition* to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The *duration* and validity of the policy was not then dependent upon payment of the premium on the day named therein, but upon payment within 30 days *after* the notice had been given. The condition upon which the policy can be forfeited, or in any way im-

paired as a subsisting contract of insurance is a failure on the part of the insured to pay the premium within 30 days after notice. * * * * The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a *full compliance* with the conditions as to payment of premium. * * * Before the defendant could raise any question in regard to the nonpayment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the assured in *default*, or to raise any point *based* on his omission to pay the last quarterly premium."

Other decisions of the courts of that state, to the same effect, were also plead and introduced in evidence at the trial; and the plaintiff claimed that this notice law and these decisions, if given effect by the Iowa court, gave her a right to recover, notwithstanding that three annual premiums on the policy were past due, because the company had not complied with this law by sending to the insured the notice. Before commencing the action she tendered to the company the three past due premiums amounting to $3,615.00, but the company refused to receive them.

It appears that in the month of Dec., 1892, and just after Johnson had paid that premium which fell due Nov. 11, 1892, the company issued to him a *supplement* to his policy, the instrument being called by the company an "ACCUMULATION POLICY." Although Johnson signed a written request, on one of the company's blanks, that this supplement be issued to him, still it must be true that the company first proffered it to him, for Johnson, naturally, would know nothing about it unless the company *first* informed him about it; but upon whose suggestion the provisions of the supple-

ment were added to Johnson's policy or the time when the supplement issued was finally deemed of no importance.

This supplement among its other provisions provided as follows: "It is understood and agreed except that as herein *expressly* modified the terms of said policy No. 385048 remain unchanged," and then proceeds to set out certain so-called modifications of the Johnson policy and among these is the following:

"After this Policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the Company on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this Policy, paid-up insurance will be issued for the reduced amount provided in said table; or (3) the Policy will be reinstated within the said six months, upon payment of the over-due premium with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing."

This provision is followed by a table in the so-called "ACCUMULATION POLICY" showing the application of the provision just quoted. This table is set out in the Iowa court's opinion hereinafter inserted.

The first defense of the company and the one that ultimately prevailed arises out of and is *based* upon Johnson's failure to pay that premium on the policy which fell due, according to the due dates named in the policy Nov. 11, 1893; and although the company does not allege or claim that it sent the notice provided for in the notice law, already quoted, still it claims Johnson's life term ~~of~~ contract of insurance was forfeit-

ed or lapsed on that day, Nov. 11, 1893, and in lieu of his *life* term of insurance there arose automatically, as it were, without the sending of the notice, the *short* term insurance provided for in the provision just quoted from the supplement. In other words his contract for a life time term of insurance, upon his failure to pay that premium, became "transmuted," as the Iowa court puts it, even though the company did not send the notice, into a short term insurance ending May 11, 1896, and Johnson having lived until Sept. 1896, plaintiff could not recover.

But notwithstanding this defense that no notice was required the company, nevertheless, as a second defense, plead that it had sent a notice but not the notice provided for in the notice law in force when the Johnson policy issued, but claimed that the amended notice law of 1892, which reduced the time for the sending of the notice, from at least *thirty* days to at least *fifteen* days before the due date of the premium, applied to plaintiff's policy although enacted two years *after* the policy issued, and claimed to have sent, under this new or amended law, a notice to Johnson *twenty-seven* days prior to the due date of that premium falling due Nov. 11, 1893. Much testimony was taken as to whether or not even this notice was mailed to Johnson and that fact was, doubtless, a question for the jury.

In the reply the plaintiff, in effect, asserts that, if given proper effect, the notice law secured to her husband and to her, as his assignee, the *right to pay* the premiums overdue on the policy, "anything therein (or in the supplement) contained to the contrary notwithstanding," and pointed out in the reply that these stipulations of the supplement were but provisions of

another insurance law of the State of New York commonly styled the "net reserve law," and that but for the fact that the company procured Johnson to waive the benefits of that law in his policy, as it originally issued, these provisions would have been a part of his policy from the beginning. The reply also denies the applicability of the amended or 1892 notice law to Johnson's policy and on that point pleaded and introduced in evidence a "SAVING CLAUSE," passed at the time the amendment was made, which expressly provides that the change made by the 1892 amendment in the 1877 notice law should not effect rights secured under the prior law, and that, aside from this and on general principles, the amended or 1892 notice law could not apply to the Johnson policy; and the reply also denied the sending even of the notice required by the amended or 1892 notice law, and especially denied that even that notice was sent to Johnson's *last known* postoffice address, and denied generally all new matters of the answer.

The trial court instructed a verdict for the defendant company *solely* on the defendant's first defense, namely, that the notice law of New York should not be given any effect and did not apply to Johnson's policy as modified by the provisions of the supplement, already quoted, and that these supplemental provisions put into the Johnson policy enabled the company to entirely evade the requirements of the New York notice law; and on appeal the Supreme Court of the State sustained the same defense in the following opinion, to-wit: (Italics are ours.)

Waterman, J.—There is but little controversy between the parties as to the facts—none as to the following matters: On December 27, 1890, the defendant

company issued to one Frank C. Johnson its policy of insurance on his life for the sum of $25,000.00. This policy was assigned to plaintiff in the year 1895 and on September 28th, 1896, Johnson died. The annual premium provided for in the contract was $1,060 and it was payable in advance on the 11th day of November in each year. The policy contains the usual provisions for forfeiture in case the premiums are not paid when due. Johnson paid the premium due on November 11th, 1892, and thereafter made no payments. After Johnson's death and on the 20th day of February, 1897, plaintiff *tendered* to defendant the amount of the past due premiums with interest to that date, which it declined to accept. Thereafter this action was brought. The defendant company was duly incorporated under the laws of the state of New York and the policy was issued in that state, and by the terms of the application, the contract was to be *construed by the laws thereof*. It was therefore a New York contract.

Wyman vs. Southard, 10 Wheat, 48, *Bank vs. Hume*, 128 U. S., 195.

2. Plaintiff claims that the policy in suit was not forfeited by the failure of the assured to pay the premiums which became due after November 11th, 1892, and before Johnson's death, for the reason that at and prior to the time of the issuance of such policy, there was in force in the State of New York a statute, (Laws of 1877, chap. 321, sec 1,) which provided:

"No life insurance company doing business in the State of New York shall have *power* to declare forfeited or *lapsed* any policy hereinafter issued or renewed by reason of non-payment of any annual premium or interest or any portion thereof except as hereinafter provided." We shall not set out the law in terms. It is enough to say that after default in order to declare a forfeiture, it requires the company to mail a written or printed notice to the assured at his last known postoffice, stating the amount due and the place where and the person to whom it is payable, and further that if the amount due is not paid within *thirty* days after mailing the notice "the policy and all

payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in *full compliance* with the requirements of the policy, in respect to the payment of said premium or interest, *anything* therein contained to the *contrary* notwithstanding. But no such policy shall in any case be forfeited or *lapsed* until the expiration of thirty days after the mailing of such notice. Provided however that a notice stating when the premium will fall due and if not paid, the policy and all payments thereon will become forfeited and void, served in the manner herein provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice hereinbefore provided for." In *Baxter vs. Ins. Co.* 119 N. Y. 454, the court, in speaking of this statute and its effects upon a policy of life insurance issued under it, said: "This statute was a part of the contract in question and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case defendant was claiming a forfeiture of the policy for non-payment of the premium when due. It was not shown that the notice required by law had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice (the one required by statute) had been served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The *duration* and validity of the policy are not then dependent upon payment of the premium on the day named therein, but upon the payment within thirty days after the notice had been given. * * * The statute prescribes this notice as a necessary condition of forfeiture and unless it was served, the assured was not in *default* because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. * * * Before defendant could raise *any question* in regard to the non-payment of

the August premium, it was neccessary to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point *based* on his omission to pay the last quarterly premium." See also: *DeFreece vs. Ins. Co.* 136 N. Y. 151; *Phelan vs. Ins. Co.* 113 N. Y. 147. In *Griffith vs. Insurance Company*, 101 Cal. 627, the same statute is considered and the interpretation given it by the courts of New York, is adopted. We do not understand that the general principles announced in these cases are disputed by appellee. Its contention is that they have no application to the contract here involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died. Several further defenses are argued, but the conclusion we reach on the one just stated renders it unnecessary that we consider the other.

In order to present intelligibly the points made by the parties, and particularly by appellant, it may be well to say something further as to the statutes of New York on the subject of life insurance and with relation to some other terms of the policy in suit. There was in force in that state, when this contract was made, a statute which we shall style the "net reserve law," giving to holders of life insurance policies, which had been in force three full years, the benefit of the net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default in this way: The reserve on such policies, "computed according to the American experience table of morality, at the rate of four and one half per cent per annum, shall on demand made, with surrender of the policy, within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rate of the corporation at the time the policy was issued, and shall be applied as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at the full amount, so long as such single premium will purchase temporary insurance for the amount at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid up insurance." * * * Laws

1879, Chapter 347, Sec. 1; Laws 1892, Chap. 690, Sec. 88. By the terms of the statutes these provisions could be waived by a proper endorsement on the policy. Such an endorsement was made on the policy in suit in these words: "Notice.—In consideration of the stipulations in case of *lapse*, specified in the policy, the provisions of chapter 347 of the laws of 1879 of the State of New York have been waived in the application for this policy." According to the terms of the original policy in suit in case of lapse or forfeiture thereof, after the payment of three full premiums, the assured was entitled to a paid up policy, the amount of which was to be estimated upon a certain basis as therein stated.

3. We now come to the change made in the contract by which, as appellee claims, it was converted into a non-forfeitable paid up policy for a certain fixed term *On December 10, 1892*, Johnson in writing requested defendant to extend to his policy "the benefits of its accumulation policy." In response to this the company issued and delivered to him a policy, or certificate, the material part of which, so far as concerns the issues here, is in these words:

"NEW YORK LIFE INSURANCE COMPANY,

346 Broadway, New York.

This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. Johnson, the benefits of the ACCUMULATION POLICY plan of the New York Life Insurance Company are hereby extended to said policy as stated on the next page. It is understood and agreed that except as herein *expressly* modified, the terms of said policy No. 385,048 remain unchanged. * * * This policy is not subject to any conditions or restrictions as to travel, residence, occupation or manner of death. * * * After this policy shall have been in force three full years in case of non-payment of any premium subsequently due and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) The insur-

ance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months upon payment of the over-due premium with interest at the rate of five per cent per annum *if* the insured is shown to the company to be in good health by a letter from a physician in good standing.

Table of Guarantees if Payment of Premiums is Discontinued.

Provided there is no indebtedness against the policy.

(Pursuant to the insurance law, Chapter 690, Laws of 1892, of the State of New York.)

If the Premiums are paid	(1) The insurance of $25,000 will be extended.	or (2) The policy may be converted into paid up insurance.
To Nov. 11, 1893,	To May 11, 1896,	or $1825
" " 1894,	" Jan. " 1899,	" 3045
" " 1895,	" Aug. " 1901,	" 4225
" " 1896,	" " " 1903,	" 5250
" " 1897,	" " " 1905,	" 6175

(Here follows extension of table.)

Policies continued in force beyond the Accumulation Period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid up insurance, on the same basis as that on which the above table is constructed."

What was the effect of this new contract? If it *converted* Johnson's policy into a contract for paid up *term* insurance, then no notice was necessary. The notice is for the benefit of the assured. It would avail him nothing when no act of his would enable him to

continue the policy in force. The language of the statute is plain enough on this point. Notice is required only as a basis for declaring a forfeiture or lapse of a policy for non-payment of premium or interest. Where the term expires for which the risk is taken, there is neither a forfeiture or a lapse. Looking now to the language of the accumulation certificate, we find that its provisions were to become a part of the contract between these parties. That the clause of the original policy providing for its forfeiture for the non-payment of premiums, was so far modified and changed that upon such failure, the policy became a paid up contract for the amount of the original insurance for a certain and definite term. On demand of the assured, within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's *life* contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his *default* in the payment of the premium due November 11th, 1893, became transmuted into a paid up policy for a term ending May 11th, 1896. But appellant argues that the accumulation certificate gave to the original policy nothing but what was bestowed by the net reserve statute mentioned above, upon all policies in which its benefits are not waived, and that the notice law would apply in such cases; and it is said the benefits of the net reserve statute were not all waived here because of the express reservation in the contract, to which we have referred, by which the assured was entitled upon default to a *paid up policy*.

We do not think the provisions of this net reserve statute had the effect to dispense with the notice, but there is a material distinction, which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation certificate to a prior policy. The benefits of that statute were given only to policies which had lapsed or been forfeited for non-payment of premium, debt or interest, and the notice had to be given to effect this forfeiture or fix such lapse. After the default, the life contract

continued in force until it was determined according to the statute. In such case, if the assured died after default but before notice, his beneficiary would be obliged to pay the past due premiums in order to recover. In the case at bar, under the modified contract, *immediately* on default in payment of the premium of 1893, the policy became a paid up contract for a *term*, and if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here, the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force; it went into effect by reason of the contract. It is true that plaintiff could have reinstated the life contract on payment of the defaulted premium within six months, and upon proof of health; but he did not do this, and, therefore, the term policy which began immediately upon the default was never altered or annulled. Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy without further payment being required of her. But on defendant's theory, if he had died on May 12th, one day after the term had expired, he could still recover, but in order to do so, would have to tender all past due premiums. This payment would thus be required for a single day's insurance. Counsel for appellant responds to this with counter illustration. He does not deny this anomalous feature of the contract as he claims it to be, but says, if Johnson had lived until May 12th, 1896, and then tendered the amount due for the premiums he would have saved his life contract. This, he asserts shows an inconsistency in the interpretation given by the trial court to the contract. As counsel thinks, this was holding that 'the policy was good if Johnson lived, but no good if he died.' Whatever right Johnson had to re-instate the life contract after his default in the payment of premiums, was given him by his new policy. The life policy could have been revived in such case, not because the term insurance had not gone into effect; nor because the character of the contract had not been changed in its terms, but for the reason that by a provision of this

very agreement, the old contract, might under certain circumstances, be made to supercede the new. We do not think he possessed any such right, after the expiration of six months from the time of his default in the payment of the premium. The life contract did not continue alive and in force after such default. A prescribed act, within a certain time, on the part of the assured, was required to give it vitality and this act was never performed. In the meantime without affirmative action of either party the term insurance went into effect. Answering an argument of counsel for appellant we will say that we do not think the accummulation certificate has any added force or virtue because it was *separately* issued. *The contract would have been the same, and the rights of the parties not different, if the terms of that instrument had been incorporated in the original policy.* As counsel construes the notice law, the assured cannot be deprived of the terms most favorable to him, in a policy containing a provision for alternative benefits, without notice being given him. But this is not the law. The notice is required only when it is sought to declare the contract forfeited or lapsed. Neither was done here. We do not regard the waiver in the policy of the benefits of the net reserve law as of any special significance though appellee in argument claims something for it. Our holding would be the same if no such waiver had been made. Our conclusion is that this was a policy for a term that expired before Johnson's death and therefore plaintiff has no right of recovery. The other questions discussed are rendered immaterial by this finding.—Affirmed.

Errors Assigned.

The errors assigned for review here are few and simple; and are: (1) That the Iowa court erred in failing and refusing to give full effect, faith and credit to the statutory provisions and laws of the State of New York, plead and proven in this case; (2) that the court erred in failing and refusing to give that effect to the statutory provisions of the State of New York, which,

by the decisions of the courts of that state, they were shown to have there; (3) that the court erred in holding these statutory provisions of the State of New York, as construed and applied in that state, were not a part of paintiff's contract of insurance, and in holding the contract of insurance forfeitable without the sending of the notice provided for in said New York notice law; (4) that the court erred in not reversing the decision of the trial court and in not awarding judgment and execution to the plaintiff, in that the answer of the defendant company set up no defense to plaintiff's right of recovery, and because the material facts of the case are not in dispute.

As to the Motion to Dismiss. It Involves the Merits.

The motion and brief to dismiss were served upon us May 21, 1902, after we had our brief for hearing on the merits partially printed, having been advised by the clerk that the case would probably be reached for hearing about the first week in ~~June~~ May 1902.

We have permitted the foregoing full statement of the case and the opinion of the Iowa court to remain as printed in anticipation of a general submission, for it seems to us that the nature of the motion to dismiss is such that it requires a full examination of the whole case to determine whether or not this motion should be sustained; and as the case will be reached, as we are advised, for general submission early in the October term nothing will be gained, probably, by submitting the motion independently.

The motion challenges this court's jurisdiction to hear this case on the ground that the Iowa court's decision rests solely on its construction and interpreta-

tion of a statutory provision of New York—the notice law, and no matter how *obviously* erroneous that construction may be this court has no jurisdiction to correct it.

Three of the cases cited by opposing counsel, *Glenn vs. Grath*, *Loyd vs. Mathews*, and *Banholzer vs. Ins. Co.*, do seem to commit this court to that doctrine even as broadly as we have just stated it; but it is worthy of remark that in each of these cases this court proceeded to, at least, review and *examine* the state court's construction of the foreign statute and in each instance the construction seems to have been *right* either as a matter of independent interpretation or it was found to be such as had been given the foreign statute by the courts of the state from which it came. For instance in the latest case cited by opposing counsel, *Banholzer vs. N. Y. Ins. Co.*, 178 N. Y., 402, the Minnesota court's construction of the New York notice law, on the point involved in that case, is seen to have been clearly sustained by the New York court itself in *Conway vs. Ins. Co.*, cited in the Minnesota court's opinion; and so the Minnesota court did give full faith and credit to the legislative enactment of a sister state, as by the Federal Constitution required, by obeying the command of the Federal statute (sec. 905) in giving to it such faith and credit as it was shown to have by law or usage in the courts of the state from which it came.

"Full faith and *credit* shall be given in each state to the public acts, records, and judicial proceedings of every other state." Is this important mandate of the Federal Constitution and the vast rights dependent upon it sufficiently satisfied and obeyed by a state court by permitting a litigant to plead these "public acts"

and introduce them in evidence at the trial of his case and then to entirely ignore them—*make no reference to them*, in its decision of the case, although it be apparent that if they had been given the effect to which they were plainly entitled they would necessarily control the whole case? Would this be questioning or denying the *validity* of such acts within the meaning of the language used in *Glenn vs. Grath*, 147 U. S., 360? Would such a course by a state court give rise to a Federal question which could be reviewed by this court? Could a state court thus purposely, capriciously or arbitrarily, perhaps, eliminate the claimed Federal Constitutional right and question from the case and thus cut off this court's power to extend this constitutional guaranty to every citizen and to his property rights in the courts of all the states? If so this very important constitutional provision *commands* nothing. It amounts to nothing more than a mere invitation to the state courts to recognize it.

In *Des Moines Nav. Company vs. Iowa Homestead Company*, 123 U. S., 555, the defendant set up in the state court as a matter of defense the decree of a Federal Court as being *res adjudicata* of the matters involved in that case, but the state court, for what seemed frivolous reasons, evaded a decision on that point and this court said:

"We can not look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question, fairly presented by the pleadings, proofs and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation and if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give a judgment

the other way, without *considering* it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion."

In *Chapman vs. Goodnow*, 123 U. S., 548, this court said:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of sec. 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court *properly* takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here."

If, on the other hand, the state court not only receives the pleaded foreign statute in evidence, and recognizes its VALADITY, but also proceeds to examine and construe it an interesting question might arise as to what specious paralogy indulged in might support the claim that the state court construed the statute and thus ousted this court of jurisdiction.

The Iowa court does not really attempt to construe the New York notice law. It seems to us that it, in effect, simply ignored the plain provisions of that law.

But a solution of these questions is not really required in this case, for we assume that it will not be denied that where the foreign statute has been given an explicit interpretation and construction by the courts of the state from whence it came and such construc

tion is plead and proven, then whether or not the state court gave the foreign statute that faith and credit which it was thus shown to have in the courts of the state from whence it came, presents a Federal question for review here; unless we continue to reason in a circle and say that if the state court in its opinion indulges in an interpretation of the other state's decisions respecting the statute and thus attempts to construe the *construction* that that would end the litigant's rights and no Federal question would be left for review here.

Now, this notice law was first enacted in 1876, but re-enacted with substantial amendments in 1877. The 1877 act seems to have been the result of experience with the prior act for the act as amended is singularly explicit, comprehensive and free from ambiguity, and yet, as might be expected, the reported cases in New York, as well as elsewhere, show many efforts on the part of insurance companies to evade its requirements.

In 1890, the case of *Baxter vs. Brooklyn Life Insurance Co.*, 119 N. Y., 450, came before the Court of Appeals of that state. In that case the following language is used with respect to this notice law and its effect upon insurance policies generally.

"These provisions (of the notice law) are to have full effect, *any condition* to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute when imported into the contract, modified its conditions in very material respects. The *duration* and validity of the policy was not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way

impaired as a subsisting contract of insurance is a failure on the part of the insured to pay the premium within thirty days after notice. * * * The statute prescribes this notice as a necessary condition of forfeiture and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a *full compliance* with the conditions as to payment of premium. * * * Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the assured in *default* or to raise any point *based* on his omision to pay the last quarterly premium."

This decision was plead and introduced in evidence in the Iowa court as showing the force and effect which the notice law was accorded by the New York courts. The language used can scarcely be called a construction or interpretation of the New York notice law. Indeed, as already stated, the act itself is so clear from ambiguity that it needs no construction; but the purpose, force and effect of the law were explicitly set forth in this Baxter case. Here, for instance, the Iowa court was told that the highest court of the State of New York had held there could be no *default* in the payment of a premium until and unless the insurance company showed affirmatively that it had sent the notice required by this notice law; and yet, start at what point you will, travel any avenue you may choose, you come at last to the point in the Iowa court's opinion that the so-called term insurance took effect *because* there was a default by Johnson in the payment of his premiums. This is the very gist of the Iowa court's decision. That court says:

"There was no forfeiture of Johnson's *life* contract, as appellant insists. By the terms of the agree-

ment which he made, his life contract upon his *default* in the payment of the premium due Nov. 11, 1893, became *transmutted* into a paid up policy for a term ending May 11, 1896."

Although this Baxter case informed the Iowa court that the provisions of the notice law must be given full effect "any condition" in the policy to the contrary notwithstanding, as the law itself plainly says, still that court holds that the insurance company had succeeded in inserting a clause in the policy which rendered the notice law wholly inoperative and inapplicable.

Notwithstanding this Baxter case told the Iowa court that the *duration* of a policy of life insurance issued in New York was not dependent upon the payment of the premium on the days named in the policy, but depended wholly upon payment within thirty days after the notice had been given, still that court held that the policy *terminated* for failure to pay a premium on the due date named in the policy, without the sending of the notice. Notwithstanding that this Baxter case told the Iowa court that the only way in which a life insurance contract issued in New York could be in any way or degree *impaired* as a subsisting contract of insurance was a failure on the part of the insured to pay the premium within thirty days after notice, still that court held that Johnson's insurance contract was impaired,—was changed from a life time contract of insurance to a short term of insurance by his failure to pay a premium on the due dates named in the policy, without the sending of the notice. Notwithstanding that this Baxter case told the Iowa court that although the policy named certain days on which the premium should be paid and provided for a forfeiture if pay-

ment was not made on these dates, yet if the insured made payment within thirty days after the required notice such payment must be taken as a *full compliance* with the provisions of the policy itself as to times of payment, still that court held that if the insured failed to pay on the due dates *named in the policy* he had no right to pay thereafter, and lost his life term of insurance and his contract therefor entirely. Notwithstanding that this Baxter case plainly told the Iowa court that before the company could raise any point of defense *based* on the insured's omission to pay a premium it must show affirmatively that it had served the notice required by this notice law, still the court permitted a defense to prevail which was based directly and wholly upon the insured's failure to pay that premium on the policy which fell due Nov. 11, 1893, according to the due dates named in the policy. What is this defense of term insurance *based* on? There can be no escape from the conclusion that it is based wholly upon Johnson's failure to pay that premium which fell due Nov. 11, 1893. That is where the whole defense starts from. The company says it will not now pay this loss *because* Johnson failed to pay that premium which fell due Nov. 11, 1893, and because of that failure a term insurance commenced which ended May 11, 1896, before Johnson died.

Discussing the effect of the supplement issued to Johnson nearly a year before the Nov., 1893, premium became due, the Iowa court says:

"What was the effect of this new contract? If it *converted* Johnson's policy into a contract for paid up term insurance then no notice was necessary."

At this point in the opinion the thought seemed to

be indulged that after the supplement was issued Johnson did not have a life term of insurance at all; that from that very day he had but a short term insurance contract; that he had no right thereafter *to pay* the premiums on the original policy and thus perpetuate his life term contract of insurance; but when it was pointed out to the Iowa court that the provisions of this supplement were but a compliance with another insurance law of New York originally passed in 1879 (p. 72) called by the Iowa court the "net reserve law" and that Johnson's policy, as it originally issued, would have contained, substantially, the provisions of this supplement had not the company induced him to waive the provisions of that law and that the notice law would apply to such a policy, the Iowa court replies, as follows:

"We do not think the provisions of this net reserve statute had the effect to dispense with the notice, but there is a material distinction which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation cetificate to a *prior* policy."

And then near the close of the opinion the Iowa court tells us that "answering an argument of counsel for appellant we will say that we do not think the accumulation certificate has any added force or virtue because it was *separately* issued. The contract would have been the same, and the rights of the parties not different, if the terms of that instrument had been incorporated into the *original policy!*" We are thus first told that because the provisions of the supplement were added to Johnson's policy after it was issued (but nearly a year before he defaulted in the payment of a premium) the notice law and its provisions did not apply to his policy, and in the next breath the court in-

forms us that its decision would have been the same had the provisions of the supplement been inserted in Johnson's policy as it originally issued! This opinion has always appeared an enigma to us. It seems simply one of those opinions—fortunately rare, in which even the highest court of a great state became confused.

Even when counsel for the insurance company sought to attach some importance to the fact that the benefits of the net reserve law of New York (substantially the provisions of the supplement) had been waived in the policy as it originally issued, and then put back into the policy through the medium of this supplement, the Iowa court replied: "We do not regard the waiver in the policy of the benefits of the net reserve as of any special significance through appellee in argument claims something for it. Our holding would be the same if no such waiver had been made;" and yet, as we have just seen, the court informs us on the preceding page that "we do not think the provisions of this net reserve statute had the effect to dispense with the notice."

Of course, the idea here expressed that the enactment of the "net reserve law" in 1879 did not release insurance companies from the duty of complying with the older law—the notice law passed in 1877, is clearly right, for side by side these two laws remained unchanged in the statutes of New York for thirteen years and during all that time both had been given effect and when in 1892 the entire body of the general insurance law of the state was revised and gathered into one act and re-enacted as "THE INSURANCE LAW" (chap. 690, N. Y. Laws, 1892) the notice law, with a modification as to the time of the sending of the no-

tice, and the "net reserve law" were both *re-enacted*. And yet, though this provision of the supplement is but a compliance with the "net reserve law" (and the supplement itself so recites) still, according to the Iowa court's holding, no notice was required to "transmute" (lapse) Johnson's policy from a contract of life term insurance into one which secured to him, substantially, nothing more than this reserve law would have given him had he not waived its application to his policy as it originally issued.

It is asserted in the motion to dismiss that the policy sued upon in this case is unlike the Baxter case policy in that it was "an ordinary forfeitable policy;" that it was not "a *non-forfeitable* policy of term insurance." Neither is Johnson's policy a non-forfeitable policy of term insurance. His policy, like all policies issued under and according to the laws of New York, Massachusetts, Missouri and some other states, is simply an ordinary life term insurance contract with a provision against a forfeiture of the net reserve on the policy in case of a default in the payment of a premium and the consequent forfeiture of his *life* term contract of insurance. Had Johnson not waived the benefits of the 1879 "net reserve law" of New York when his policy originally issued it would have been, in respect to the point now under consideration, just like the policy involved in the Baxter case, except that in the Baxter policy the insured chose, as the law provides he may do, to take for the net reserve on his policy a paid up whole life policy for such a sum as the net reserve would purchase, instead of the other benefit, provided for in the law, extended insurance for such a length of time as the net reserve would carry the original policy; but no

matter which one is chosen the notice law would still apply to the policy.

Although the Baxter case policy is not set out at length in the reported case and, hence, its provisions were not known to the Iowa court, yet inasmuch as the insurance company has stated in its brief to dismiss that the policy was "an ordinary *forfeitable* policy," just to show how near an insurance company can come to stating the exact facts when its interest is better subserved by a misstatement of them, we here set out the Baxter case policy as it has been certified to us by the clerk of the Court of Appeals of New York, to-wit:

EXHIBIT A.

THE BROOKLYN LIFE
INSURANCE (VIGNETTE) COMPANY
OF NEW YORK.

Amount.	Quar. Prem.
$3,000.	$20.97-100.
No. 21,839.	Age, 35 years

BY THIS POLICY OF ASSURANCE

In consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and limitations hereinafter specified, promise to pay to — Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person, or their gurdian for their use, or if there be no such children surviving, then to the Executors, Administrators or Assigns of the person hereby insured, the sum of Three Thousand Dollars, at the office of said Company, in the City of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this Policy of Joel J. Matteson, of Bradford, in the County of McKean, State of Pennsylvania.

Subject to the following conditions and limitations:

1st. The quarter annual premium of Twenty Dollars and ninety-seven cents, shall be paid in advance on the delivery of this policy, and thereafter on the Twen-

ty-fourth day of August, November, February and May, in every year, during the continuance of this contract.

2d. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the Company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this Company shall not be liable for more than the net reserve for this policy at the time of death, computed according to the American Experience Table of Mortality, with four and one-half per cent compound interest.

3d. *This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture shall occur after three full years premiums have been paid, the Company will issue a paid up whole life policy, in accordance with the provisions of Chap. 347, of the Laws of 1879, of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.*

4th. The provisions and requirements printed by the Company upon the back of this policy, are hereby referred to and accepted as part of the contract, as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation, then in no such case shall the full liability of the Company under this Policy be disputed.

In Witness Whereof, the Brooklyn Life Insurance Company have by their President and Secretary, signed and delivered this contract at the City of New York, in the State of New York this Twenty-fourth day of May, One thousand eight hundred and eighty-four (1884).

WM. DUTCHER,
Secretary.

W. M. COLE,
President.

Printed on the back of said Policy, and referred to therein, is the following provision:

6th. This Policy is a contract, made and to be executed in the State of New York, and shall be construed only according to the laws of that state, and no suit shall be brought against the Company upon this Policy, except in the Courts of that State, or in the Circuit or District Courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

I, W. H. SHANKLAND, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of Policy of Assurance, used as an exhibit in the action in this court entitled "John T. Baxter, Respondent, vs. The Brooklyn Life Insurance Company, Appellant," ..... with the printed case used at the argument thereof and now on file in this office, and that the same is a correct transcript therefrom.

In witness whereof I have hereunto set my hand and affixed my official seal, at the City of Albany, this Fifteenth day of August, A. D. 1902.

[SEAL.] W. H. SHANKLAND,
Clerk.

Now, this Baxter policy is as much "non-forfeitable" as Johnson's policy in which the other benefit of the "net reserve law," *extended* insurance, is given, except that Johnson would not, as the company claims, have had to *apply* for the extended insurance within the six months mentioned in the Baxter policy and in the "net reserve law." But granting this exception, could the company evade the requirements of the notice law by simply inserting in its policy that after default in the payment of a premium or, to use the exact language of the supplement, "in case of non-payment of any premium" the provisions of the policy as to extended insurance or paid-up policy, as the case might be, took effect automatically, as it were, and without

request from the insured? Suppose Johnson's policy had provided that "in case of non-payment of any premium" the company, without request from him, would issue to him a paid-up policy for such an amount as the net reserve on his policy, applied as a single premium, would buy, would such a provision dispense with the sending of the notice required by the notice law? Or suppose that the policy provided, as many policies do, that in case of default in payment of any premium, after a certain number have been paid, the company would pay to him in *cash* the net reserve on his policy, without request from him, would such a provision enable the company to escape compliance with the notice law? Or suppose the policy provided that in case of non-payment of any premium, after a certain number had been paid, the company, without request from him, would send him $100 or a railroad ticket to New York City, would this dispense with the sending of the notice? Does the *character* of the benefit stipulate for, after default in the payment of a premium, make any difference as to enabling the company to evade the notice law?

It was amazing to us that any court, at this late day, could be mis-led by the use of this beguiling word "non-forfeitable" boldly stamped on an insurance policy. Ever since the passage of the "net-reserve law" in New York in 1879, and the passage of a very similar law in Massachusetts in 1880, substantially enacted in four or five other states later, insurance companies, *obliged* by these laws to provide for some sort of an application of the reserve or net reserve for the benefit of the insured in case of his default in payment of the regular premiums, have conspicuously branded their policies as

"non-forfeitable." Mr. Bacon, sec. 373, speaking of these policies says:

Many policies are called "non-forfeitable" although, by their terms, so many conditions and limitations are imposed, that the word *means little* except that they are either subject to the Massachusetts law, of which we shall soon speak, or that, after a certain number of premiums are paid, they may be exchanged for paid-up policies or become paid-up by their own terms for a certain percentage of the original amount '

The Notice Law Cannot Be Waived.

But still another case from New York relating to the effect of this notice law on insurance policies there issued was introduced in evidence in the Iowa court, *Rowe vs. Brooklyn Life Insurance Co.*, 16 Misc. Rep., 323, (record, 32) From their observations concerning this case in the motion and brief to dismiss we must assume that opposing counsel have forgotten the purpose for which this case was brought to the attention of the Iowa court. This case (record, 32-33) following *Phinney vs. Mut. Life Ins. Co.*, 67 Fed. Rep., 493, holds the requirements of the New York notice law cannot be *waived*. This point is well settled by authorities, state and federal, all over the country. Among the many cases so holding are, *Griffith vs. N. Y. Life Ins. Co.*, 101 Cal., 627; *Equitable Life Assurance vs. Tremble*, 83 Feb. Rep., 85; *Equitable Life vs. Nixon*, 81 Fed. Rep., 796, and the same doctrine was announced concerning a similrr law in Michigan; *Warner vs. Nat. Life*, 100 Mich., 157.

This court in *Equitable Life Assurance vs. Clements*, 140 U. S., 233, announces the same doctrine with respect to a statute of Missouri regulating the form of

policies and method of commutation in case of default in payment of premiums, in the following language:

"The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restrictions, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter."

Even in Iowa we find in *Marden vs. Hotel Owner's Ins. Co.*, 85 Ia., 580, the Iowa court held that the provisions of a somewhat similar law could not be waived or *contracted against* by any stipulation in the policy.

Now, if the requirements of the New York notice law cannot be waived by a direct stipulation to that effect in the policy, can a waiver or evasion of the law be accomplished by *indirection*—by putting into the policy a stipulation conferring some benefit on the insured after a default in the payment of a premium? The Rowe case informed the Iowa court that according to "law and usage" in the state of New York the requirements of the notice law could not be waived; and the Baxter case informed the Iowa court that the provisions of the notice law must have full force and effect "anything therein (in the policy) contained to contrary notwithstanding;" but the effect of the Iowa court's decision is that the requirements of the notice law may be waived and that the insurance company can, after all, so construct its policy that the law will have no effect upon it whatever.

During the twenty years this New York notice law has been interpreted and applied by state and federal

courts to life insurance policies made in and governed by the laws of New York, as might be expected, the reported cases show many ingenious contentions and efforts to persuade the courts that its provisions did not apply to this or that kind of a policy, but the courts have steadfastly refused to except any policies from its operation, save those expressly excepted in the law itself. For instance, in *McDougal v. Provident Savings Life Company*, 64 Hun., 515, it is said:

"An ingenius argument has been construed by the defendant's counsel to the effect that this contract does not fall within the provisions of Chap. 321 of the laws of 1877 because it was a contract originally for an insurance for one year only, and that a notice to pay an annual premium was not contemplated by its terms. He fortifies his argument by the assertion that the annual premium which the assured was required to pay was less than the amount that would have been required by the ordinary policies issued upon the life of insured persons, but, as it seems to us, the particular form of this policy is unimportant, providing it appears from the whole instrument, as we think it clearly does, that there was an intention on the part of the contracting parties that the insurance should be *continued until the death* of the assured, providing he fulfilled *his* part of the agreement in respect to the payment of the premiums. It was not competent under this contract, for the defendant, at any time, to terminate the agreement, except under the provision in respect to impaired health through the use of stimulants and narcotics, which provision does not concern the case in its present aspect. On the contrary it was in the *power* of the insured to *continue* the contract by the payment of the annual premium. Under these circumstances, we do not see but that this is, in effect, the ordinary insurance contract entered into by insurance companies organized and doing business in this state. One of which the defendant is shown to be. No scheme, however ingenious, can be devised by an insurance agent which the courts can permit to be successful in eluding

the provisions of this most reasonable statute, which requires notice to the assured 30 days before his premium falls due."

This McDougal case was reversed by the Court of Appeals in 135 N. Y., 551, on the point that the notice sent was sufficient in form and substance, but the Court of Appeals, in effect, adhered to the doctrine announced in the foregoing quotation as to the applicability of the New York notice law to the policy, and said: "We should hesitate to call in question the applicability of the statute to *any* class of life insurance policies."

Adopting the thought expressed in the opinion in this McDougal case, "the particular form of this (Johnson's) policy is unimportant, providing it appears from the whole instrument, as we think it clearly does, that there was an intention on the part of the contracting parties that the insurance should be continued *until the death* of the assured, providing he fulfilled his part of the agreement in respect to the payment of the premiums." Can any lawyer doubt that it was the intention of the defendant company, as well as of Johnson, even after the supplement issued, that his insurance should be continued until his death, providing he fulfilled his part of the contract and paid the annual premium. Why, the letter (record, 67) which transmitted to Johnson the supplement extending to his policy the benefits of really nothing more than the "net reserve law," as already shown, and which supplement had been arranged for, as this letter shows, in December, 1892, (it is dated January 20, 1893), nearly a year before he defaulted in the payment of a premium, expresses the hope, on behalf of the company, that Johnson will now *continue* to pay the premiums on the policy for the next "seven years at least."

The payment of seven more annual premiums would have brought Johnson to a period in the life of his policy where he might exchange his policy for $10,570 and certain dividends, as is shown by other provisions of this supplement (record, 16–17) and so, the company expresses the hope in sending the supplement that he would continue the policy at least until that period was reached, but, strange as it may seem the Iowa court reaches the conclusion that at the time he accepted this supplement he *then* and thereby unconditionally contracted for a term of insurance commencing November 11, 1893, and ending May 11, 1896. This is the final thought of the Iowa court expressed in the last lines of its opinion. Clearly if this was so Johnson would have had no contract right to pay even the very next premium and though he tendered it on the very day it fell due, according to the due dates named in the policy, Nov. 11, 1893, the company could have legally refused to receive it, for Johnson, according to the Iowa court's view, had no contract on which he could *continue to pay* premiums after he accepted the supplement! If on the other hand his contract right to pay the annual premiums and thus perpetuate his policy even until his death remained to him after he accepted the supplement, pray tell us how he lost this right—the right to pay, without the company sending the notice and making a demand for the premiums, for the notice law and the Baxter case says if he paid within thirty days after the *demand* for payment contained in the notice such payment must be taken as a full compliance with the terms of the policy respecting the times of payment. And if the company, not having sent the notice, could not legally refuse the premium if tendered the next day

after Nov. 11, 1893, then there never came a time up Johnson's death when he did not possess the right to pay these past due premiums. It was a contract right which his assignee or he possessed when he died.

Of course, the company does not and cannot claim that the notice law was not a part of Johnson's policy *before* the supplement issued. Not only must this be admitted, but even if the provision of the supplement relating to extended insurance, etc., in case of "non-payment" (default) of a premium had been inserted originally in the policy, still the notice law would have become a part of the policy (the Iowa court to the contrary notwithstanding) for there would even then have been a period of, at least, 3 years during which time these provisions would not apply at all in case of a default.

Now, if as we see, the notice law was a part of Johnson's policy before the supplement issued to him as fully as though its terms were written into the policy (the Baxter case) then even the very terms of the supplement retain the notice law as a part of the policy for it says (record, 16) "that except as herein *expressly* modified the terms of said policy No. 385048 remain unchanged." If then before the supplement issued the terms of Johnson's policy concerning the times of payment of premiums provided that *demand* must be made for them by a thirty days notice and if paid in response to this demand that that would be a full compliance with the contract, there is nothing in the supplement which even attempts to take away or even modify, expressly or otherwise, these terms of his policy.

Nor does it matter that the language of the sup-

plement says (record, 17) that in case of "non-payment" of a premium its benefits will attach for, if the notice law be retained as part of the policy, "non-payment" means not paying in response to the demand required to be made. And this is just where the fundamental fallacy in the Iowa court's opinion lies. That court assumed that there could be a default or "non-payment" which would usher in the benefits of the supplement without any demand for the premiums as the notice law provides, notwithstanding that the Baxter case plainly said there could be no *default* in the payment of a premium until the notice was sent nor could the company defend on any point or ground *based* on a failure to pay a premium until it proved it had made the demand,—had sent the notice.

Of course, the Iowa court's holding is without a precedent anywhere and we dare say that it was as much a surprise to the defendant company, and to New York Life Insurance Companies generally, as it was to us. The company itself did not so construe the notice law or its policy, including the supplement, for it pleads, as already stated, that it sent the notice required by the notice law; but why send a notice and take pains to preserve a copy and file away in the archives of the company an affidavit purporting to show the sending of it on a certain day if the company really believed that no notice was required to forfeit, lapse or "transmute" such policies as *this* into term insurance.

In its opinion the Iowa Court says:

"Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, (the day before the term insurance expired) plaintiff could have recovered the full face of his policy, without any further

payment required of her. But on defendant's theory, if he died on May 12, one day after the term had expired, she could still recover, but in order to do so, would have to tender all past due premiums. This payment would thus required for a single day's insurance. Counsel for appellant responds to this with a counter illustration. He does not deny this anomolous feature of the contract, as he claims it to be, but says that if Johnson had lived until May 12, 1896, and then tendered the amout due for his premiums, he would have saved his life contract."

The illustration used by the learned trial judge and adopted by the learned Supreme Court entirely ignores the patent fact that the notice law became and remained a part of the policy. It seems to have been assumed by the Iowa court that the "counter illustration" which we have used admitted the trial court's view of Johnson's right to claim the benefit of the extended insurance provided for in the supplement before the company lapsed the policy by sending the notice. Far from it! The "counter illustration" used was calculated to and does, when rightly interpreted, show the fallacy of the trial court's deduction. The illustration was intended to exemplify the idea that on *every* day after Nov. 11th, 1893, up to the time of his death Johnson's right *to pay* the past due premiums continued, the company not having sent the notice, and that if instead of dying on May 10th, the day before the alleged term insurance expired, he had appeared at the company's office on May 12th, the day after the alleged term insurance expired, and tendered the past due premiums the company would have been obliged to receive them and that if this right,— the right to pay on May 12th, 1896, was admitted, if Johnson was then alive, the result of the Iowa court's hold-

ing would then be that the policy was good if Johnson lived but no good if he died.

Let us not forget that when this notice law is read into Johnson's policy, as it has to be, that the policy the provisions of the supplement included, reads, in effect, as though there was written upon it after all its other provisions this clause, to-wit: "This policy shall not be forfeited or declared forfeited or lapsed (transmutted) until the expiration of thirty days after the mailing of the notice required by the New York notice law and a failure of the insured to pay the premium demanded in such notice, *anything* hereinbefore recited to the contrary notwithstanding." Under that stipulation in the policy both parties would secure rights, the insured the right to resist forfeiture or lapse until the notice was sent and the company to refuse to extend the results of the lapse on the policy until it elected to send the notice. *Mich. Mutual Co. vs. Bowes*, 42 Mich., 23. As was said of a somewhat similar law, even by the Iowa court, in *Boyd vs. Cedar Rapids Ins. Co.*, 70 Ia., 325: "The object of the provision is to give the defendant a right to declare the policy suspended, nothing is in fact obligatory, not even the giving of notice of the maturing of the notes, unless the company desires to declare the policy suspended. Viewing the matter in this light, we see nothing inconsist in the Legislature's providing what the company may do as a condition precedent to the exercise of such right. If it does *nothing* the policy simply *remains in force*." And let us not forget that it is not within the power of the insurance company or the insured nor *both* together to waive this New York notice law or enter into a contract of life time insurance which will not have the provisions of

this notice law incorporated into it—*Griffith vs. N. Y. Life*, 101 Cal., 628; *Equitable Life vs. Tremble*, 83 Fed. Rep., 85.

Johnson could not take the benefits secured to him by the provisions of the supplement by simply omitting to pay a premium, the company not having sent the notice. Suppose that on the next day or at any time within six months, after Nov. 11th, 1893, Johnson demanded a paid up policy for the $1825 provided for in the table. Now, to grant that request might then be for the company's benefit and it might not. But let us assume that the company refnsed. Could Johnson, as a matter of contract right, enforce such a demand? Or suppose that one of the benefits to be enjoyed by the insured after lapse was that he should have the privilege of taking out the net reserve in cash, (this is often provided for in case of lapse) and that Nov. 12th, 1893, or thereafter, Johnson demanded that his policy be "transmutted" (lapsed) into its *cash* surrender value, the company could point to the provisions of its policy, the notice law being a part of it, and tell him that it was not ready to staad that result of a lapse of his policy and that it had not elected to lapse it by sending the notice.

The plaintiff, Johnson's assignee, or in case Johnson had not assigned the contract, then his legal representatives, in bringing suit would have to bring it upon the life term policy whether Johnson died before or after May 11th, 1896, for the company, not having sent the notice and thereby elected to put the term insurance in force, the life contract continued. In other words the company continued to carry the *life* term risk and is entitled to recover therefor the life premi-

ums on the open contract and the past due premiums must be paid the company or deducted from the judgment. They were tendered the company before this action was brought.

Singularly enough, on the very day that the Iowa court filed its opinion, April 8th, 1899, the Supreme Court of New York in *Fischer vs. Metropolitan Ins. Co.*, 37 App. Div., 575, reaffirmed the doctrine of the Baxter case, quoting therefrom the language which we have hereinbefore set out, and in the course of the opinion also said:

"The effect of the statute was that after a policy had once been issued, no act of the insured by way of omission to pay the premium could, of itself, work a forfeiture of the policy. So far as it was concerned, the contract was a *permanent* one until some act of the defendant had been done by way of putting an end to it. Therefore, when any one entitled to sue upon it had occasion to bring an action, he was not compelled, as a condition of *making out his cause* of action, to show that the payment of the premiums had continued after the policy had once taken effect."

The Fischer case has since been affirmed by the New York Court of Appeals, 167 N. Y., 178. Now, suppose in the case at bar that the plaintiff had rested her case, as she might have done, with the introduction of the policy only and offered no proof as to a tender of the past due premiums, how was the defendant company to prove its alleged defense that a term insurance commenced some time after the policy was issued and delivered. It could not prove that defense without *first* offering proof of the sending of the notice followed by proof of failure to pay in response to the notice.

It is true that neither this Fischer case nor *McDougal*

vs. Provident Life, 64 Hun., 515, already alluded to and quoted from, were introduced in evidence in the Iowa court; but there is quite enough in the other two cases introduced in evidence, *Baxter vs. Brooklyn Life* and *Rowe vs. Brooklyn Life*, *supra*, to have compelled the Iowa court to hold with the plaintiff's contention if the opinions in these two cases had been heeded and followed, and it seems absurd to contend that they do not reach and control the law as to plaintiff's policy for obviously this policy was one which covered the whole life time of the insured provided he continued to pay the premiums and such being the contract to cut off the right to pay and thus *discontinue* this contract the notice must be sent.

The New York Statute Ignored.

We have already said that the Iowa court simply ignored the New York Statute. Aside from any decision of the courts of New York brought to the attention of the Iowa court, if any heed or consideration had been given to the plain provisions of this New York Statute, the decision of the Iowa court must have been for the plaintiff. As already pointed out, this notice law was enacted in 1877. Doubtless, even then, many insurance policies provided for some benefit to the insured in case his policy was forfeited for failure to pay a premium, or provided for reinstatement within a limited time on certain conditions; and then, as well as now, the policy was said to be "lapsed" when it was in this condition. The word "lapsed," as applied to insurance policies, had, no doubt, already acquired the meaning it possesses today.

But now, the notice law says that no insurance

company shall have power to declare "forfeited or *lapsed*," any policy of life insurance issued after the passage of the act, until the notice be sent. The use of the two terms "forfeited *or* lapsed" in the statute plainly shows that the Legislature intended to attach a distinct meaning to each; and two years later when the "net reserve law" was passed its benefits were extended to any "lapsed" policy as well as to any "forfeited" policy. But the Iowa court, at one point in its opinion, correctly opines that the notice must be sent to lapse a policy in New York so that the benefits of the net reserve law would attach to it; and yet, although the supplement extends to Johnson's policy nothing more, as it states, than these "net reserve law" benefits, still the policy may be "transmutted" in Iowa into these benefits without sending the notice. Lapsing a policy in New York brings the same results as "transmutting" it in Iowa! Is this New York Statute to be evaded by substituting sound for substance?

This Court Should Enter or Order Judgment for the Plaintiff.

If, on the point already argued this court should reach the conclusion that the case should be reversed then we ask that judgment be entered in this court for the plaintiff or that the Iowa court be directed to enter judgment for her; for if the so-called "term insurance" defense cannot prevail then there is no other defense of any merit *plead* or proven. True, as a second defense, the company does plead that it sent Johnson a notice, but not the notice required to be sent by the law in force when Johnson's policy issued in December, 1890—the 1877 notice law. That law, as will be observed (rec-

ord, 8) provides that the notice, if sent before the premium falls due, according to the due dates in the policy, must be sent "at least *thirty* and not more than sixty days prior to the day when the premium is payable."

The company alleges (record, 14) "that at least fifteen and not more than forty-five days prior to the said 11th day of November, 1893, which was the date when, by the terms of said policy, the 1893 annual premium became due and payable, to-wit: on the 16th day of October, 1893" it mailed to Johnson, at his last known postoffice address, a notice warning him that unless said premium was paid by or before Nov. 11th, 1893, his policy and all payments thereon would be forfeited. This, of course, was not the notice called for by the terms of Johnson's contract for, counting out the day upon which it was mailed, (*Hicks vs. Ins. Co.*, 60 Fed., 609,) it gave but *twenty-five* days notice prior to the day upon which the premium was payable, which was insufficient. *Hicks vs. Ins. Co., supra.*

The company, however, contended that this twenty-five day notice was sufficient, on two grounds: First, because, as already pointed out, the notice law of 1877, in force when Johnson's policy issued, was amended in 1892, so as to provide that the notice might be sent "at least fifteen and not more than forty-five days prior" to the day when the premium was payable; and it was contended that notwithstanding this 1892 law (record 12) expressly says that it shall apply only to policies "*hereafter* issued or renewed," and although there was passed, as part of the same act, (record 20-70) a saving clause which, referring to the schedule of laws repealed, says: "The repeal of a law, or any part of it, specified

in the annexed schedule (the 1877 act is in the schedule) shall not effect or impair any act done or right accrued, etc.," still this 1892 act, which took effect October 1st, 1892, applied to Johnson's policy as to the next premium falling due thereon November 11th, 1892, and as to all premiums thereafter.

This contention was based on the ground, as we understood it, that this notice law was purely remedial; but, at least, two courts have since passed upon this precise point and have held to the contrary,—*Germania Life Ins. Co. vs. Peetz*, (Tex.), 47 S. W., 687; *Hathaway vs. Mut. Life Ins. Co.*, 99 Fed., 534. This last case is reversed in 106 Fed., 815, but not on that point.

We are aware that *Rosenplaenter vs. Provident Life Co.*, 91 Fed., 728, affirmed on appeal to the circuit court of appeals in 96 Fed., 721, might be considered an authority in favor of the company's contention here. But it seems to us that in the consideration of the effect of this 1892 act important and controlling points were entirely overlooked by the court in the Rosenplaenter case and, indeed, in the Hathaway and Peetz cases as well. It will be observed that the 1892 act expressly says that it shall apply only to policies issued or renewed *after* its passage. Now, suppose that in this case the company answered, and on trial proved, that it had sent Johnson such a notice as is required by the 1877 act, not less than 30 nor more than 60 days prior to November 11, 1893—say a *fifty* days' notice—would not such a notice have forfeited this policy? If the company had proved the sending of such a notice in this case and the plaintiff had claimed that the 1892 act applied and hence the fifty days' notice was outside the limit the company would, no doubt, make and sus-

tain the claim that the 1892 act did not apply to the plaintiff's policy because it issued before the passage of that act and was, by the very terms of the act, expressly excluded from its operation.

The plaintiff's policy, not being a one year term policy nor issued or renewed after the passage of the 1892 act, it is impossible to apply the provisions of that act to it. And so, as to this policy and all policies like it issued after the 1877 act took effect and before the passage of the 1892 act, the company must send the notice required by the former act, or the court must hold that the repeal of the 1877 act relieved insurance companies of the duty of sending *any notice whatever* in order to forfeit such policies. Clearly this last proposition cannot prevail, for in the enactment of the 1892 law the legislature evinced an intention to still require insurance companies to send notice and not to relieve them from that duty at all even as to the policies theretofore issued. The very terms of the 1892 act make its operation prospective and even though it be deemed that this law is only remedial, still, by its own terms, it confines its remedies to policies issued after its passage and excludes them from policies issued before its enactment, and this, in connection with the simultaneous passage of the saving clause, already alluded to, leaves even the remedial rights of the insurer and all rights of the insured, as to policies issued prior to the 1892 act, undisturbed. Judge Hammond who gives us the first opinion in the Rosenplaenter case, 91 Fed., 728, sixteen years before he delivered this opinion, conceded that even a remedial law may "exclude by its terms or necessary implication" a retroactive effect, in *Larkin*

vs. Saffarans, 15 Fed., 147; and, as already shown, this 1892 act, not by necessary implication, but by the plainest possible terms, excludes its retroactive effect as to, at least, all life term policies issued before its passage and not renewed after its passage. We do not concede, however, that either the 1877 or 1892 acts were remedial laws. They do not effect court remedies on policies at all. It seems to us that they fixed rather contractual rights and obligations. The two New York cases cited by Judge Lurton in his opinion in the Rosenplaenter case, 96 Fed., 726, do not even tend to sustain the proposition that the 1892 act applies to Johnson's policy.

Again and again in the State of New York the language of the Baxter case to the effect that this notice law entered into the contract of the parties contained in the policy as though the very terms of the law had been inserted in the policy has been reaffirmed by the courts of that state.

Second. But the company, conscious of the soundness of this position, sought to convince the Iowa court that this Johnson policy was "renewed" within the meaning of the 1892 act after its passage by contending that because Johnson paid, Nov. 11th, 1892, an annual premium on the policy, after the 1892 act went into effect, therefore, he "renewed" the policy within the meaning of that act. It was thought this position was supported by the case of *Carter vs. Ins. Co.*, 110 N. Y., 15. The precise form of the policy considered in this Carter case is not disclosed by the report of the case, but if it was, in substance, a life term of insurance issued and calculated upon *level life time annual premiums*, then the decision is unsound in principle

and contrary to other decision of the courts New York; for the gist of the opinion in the Carter case is that even a life contract of insurance issued and calculated upon level lifetime annual premiums with a proviso that the contract may be forfeited for non-payment of any annual premium is an insurance contract from year to year only. This is directly contrary to the holding in *Cohen vs. N. Y. Mutual Ins. Co.*, 50 N. Y., 618, and *Sands vs. N. Y. Life Ins. Co.*, 50 N. Y., 632. In the first of these cases, speaking of a policy like the one in suit here, the court said: "This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to-wit, the payment of the annual premiums"; and in the last of these two cases Judge Peckham likens such a policy to a lease of land to become void if the rent reserved be not paid at stated periods. But is a lease for a term of years *renewed* every time an annual rent is paid upon it. This court has many times held that policies, like this Johnson policy, are not contracts from year to year. *McMaster vs. N. Y. Life Ins. Co.*, 183 U. S., 35.

But, at any rate, *Carter vs. Ins. Co., supra*, can have no application to the Johnson policy, for in that case the policy under consideration was issued *prior* to the passage of the 1876-1877 notice law of New York and, hence, did not take that notice law as a part of it and, if it was deemed a contract from year to year, might be said to terminate, *ex vi termini*, each year and to be "renewed" every time a premium was paid upon it; but suppose, as in the case at bar, the policy issued after the passage of the 1877 notice law, then it could not terminate each year, even if the insured had nothing more than the mere right or privilege of renewal, un-

less and until the company sent the notice. This distinction and its effect on this question of "renewal" of policies issued before and after the passage of the 1877 act is pointed out in the opinion in *Germania Life Ins. Co. vs. Peetz*, 47 S. W., 690, on the motion to rehear that case and see *Wyman vs. Ins. Co.*, 45 Hunn., 187, and so the payment of the annual premium by Johnson Nov. 11th, 1892, after the passage of the 1892 act, did not renew his policy at that time, even within the holding of the Carter case, for his policy being subject to the 1877 act did not *end* then unless the notice had been previously sent for that premium and there was no proof of that and no attempt to prove it; and it is fair to indulge the presumption that if any notice was sent by the company as to that premium it was one required by the 1892 act instead of that required by the 1877 act as the company now and here contends that the last act being remedial only applied to Johnson's policy as to all premiums falling due after Oct. 1st, 1892; but we have already shown that such a notice would be inapplicable to and insufficient as to Johnson's policy.

Even if the 1892 Act Be Deemed Applicable to Johnson's Policy the Notice Sent Was Insufficient.

It will be observed that Johnson's policy, after the supplement issued to him, provides (record 17) that a grace of one month will be allowed in the payment of any annual premium falling due after issuance of the supplement, and that "during the month of grace the policy *remains in full force*." Now, the notice (record 47) sent Johnson, as it is alleged, notified him that unless the annual premium of $1060, mentioned in the

notice, was paid by or before November 11th, 1893, "such policy and all premiums thereon will become forfeited." That is to say, he was notified by that notice that unless he paid before or on that day, November 11th, 1893, which was, as we have already shown, but 25 days after the mailing of the notice his policy would be forfeited. This was, in effect, telling him that unless he paid on or before that day he could not pay the premium thereafter. This notice was clearly insufficient even under the 1892 act when the provision of Johnson's policy as to *grace* is taken into consideration. *New York Life Ins. Co. vs. Dingley*, 93 Fed., 153. Even conceding that the 1892 act applies the notice sent was insufficient for still another reason. The 1892 act provides, as was stated in the Dingley case, that the policy shall not be forfeited until the expiration of *thirty* days after the mailing of the notice required by that act and yet the notice told Johnson that his policy, if his premium was not paid, would be cancelled on the 25th day after the mailing of the notice.

THE TESTIMONY IS UNDISPUTED THAT THE NOTICE WAS NOT SENT TO JOHNSON'S LAST KNOWN POSTOFFICE ADDRESS.

The notice sent (record 47) shows that it was addressed to "Frank C. Johnson, Randolph, Iowa" and the witness who claims to have mailed it on the 16th of Oct. 1893, (and this was a question for the jury record 48) swears (record 47) that he addessed it to Mr. Johnson at Randolph. But now, as we have already seen, on May 30th, 1893, (record 67) nearly six months prior to the mailing and addressing of this notice the manager of the defendant company at Omaha, Nebraska,

E. C. Smith, knew that Johnson's address was Omaha "Care of Citizens Bank" at which bank he had a private desk and at which bank his place of business was at that time (record 67-68); and so this manager knew very well that the proper place to address Mr. Johnson in 1893 was Omaha, Nebraska, care of Citizens Bank, and, hence *he* addresses his letters to Johnson accordingly and sends him the supplement in the letter addressed to that address. This then was Johnson's last *known* post office address, for it will scarcely be denied that Smith's knowledge of Johnson's address was the knowledge of the company. *Goodwin vs. Ins. Co.*, 97 Ia., 226. Mr. Smith testifies (record 59) that in 1893 he maintained the company's office in Omaha on the third floor of the N. Y. Life Building and had the title of "Manager" of the company at that point.

And so, we contend that if this court should conclude that this case should be reversed on the insufficiency of the company's first defense—the inapplicability of any notice law to the policy, that there is nothing left, according to the pleadings as they now stand, upon which to order a new trial and that judgment should be entered here ordered in the lower court for the plaintiff for the full amount of the policy, $25,000, with accrued interest according to the rate provided for by the Iowa statutes, 6 per cent, from Jan. 1st, 1897, as asked in her petition, less the amount of the premiums and accrued interest thereon, $3,615 tendered the company before the bringing of this suit at its Home Office in New York on the 20th of Feb., 1897, (record 28).

Very respectfully submitted.

CONSTANTINE J. SMYTH.

Attorney for Plaintiff in Error.

Supreme Court, U.S.
FILED
MAY 26 1902
CLERK

In the Supreme Court of the United States.

Filed May 26, 1902.

No. 138.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

NEW YORK LIFE INSURANCE COMPANY,
DEFENDANT IN ERROR.

Motion, and Brief in Support of Motion, to Dismiss, Writ of Error.

GEORGE W. HOBBELL AND
JAMES H. McBROOM,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

18,133.

JANE JOHNSON,
Plaintiff in Error,
vs.
NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

Motion to Dismiss Writ of Error.

Comes now the New York Life Insurance Company, defendant in error, by its attorneys, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, and for ground of said motion says:

First. That the judgment from which said writ of error was taken was a judgment of the Supreme Court of the State of Iowa, which was the highest court of said state in which a decision in said suit could be had (Record, page 195).

Second. That the ground upon which said writ of error was allowed and the jurisdiction of this Honorable Court invoked was, that said plaintiff in error claimed in said cause a right or privilege under the Constitution of the United States, and the decision was against the right or privilege specially set up or claimed by her under such Constitution (page 106).

Third. That the particular right or privilege the

plaintiff in error claimed was denied her by said judgment was, that said Supreme Court of the State of Iowa failed to give full faith and credit to the statutory provisions and laws of the State of New York, by which it is provided that no life insurance company chartered under the laws of the State of New York shall have power to declare forfeited or lapsed any policy without first mailing to the insured a notice at least thirty and not more than sixty days prior to the day when the premium was payable, stating therein the amount of the premium, the due date of it, the time and place of payment, and that the policy will become forfeited and void if the premium is not paid within thirty days after the mailing of the notice (pp. 106, 108, 6).

Fourth. But in truth and in fact said Supreme Court of Iowa did not by its said judgment fail or refuse to give full faith and credit to any of the statutes or laws of the State of New York. On the contrary, said Supreme Court of the State of Iowa by its said judgment fully and carefully considered said statutory provisions, and all the statutes and laws of the State of New York brought to its attention in said record, and their operation and effect, in connection with the terms of the life insurance contract in question; and after giving full faith, credit, and effect to each and all of said statutes and laws of the State of New York, said court concluded that said New York statutes and laws had no application to said life insurance contract, "Because the policy sued upon was, at the request of the insured, converted into a paid-up policy for a fixed term, which term expired before the assured died" (p. 101). The Iowa court's decision was wholly based upon the construction it gave to the insurance contract in

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question and upon its judgment of the operation and effect of said statutes and laws of the State of New York, and was not due to a failure to give full faith and credit to said statutes and laws of said New York State.

Wherefore, forasmuch as by reason of the premises said final judgment is not one of those which may be re-examined and reversed or affirmed by this Honorable Court, said defendant in error prays that said writ of error may be dismissed for want of jurisdiction.

JAMES H. MCINTOSH,
Att'y for Defendant in Error.

GEORGE W. HUBBELL,
Of Counsel.

BRIEF IN SUPPORT OF THE FOREGOING MOTION TO DISMISS.

I

The Issues in the State Court.

The plaintiff's action is based on a life insurance policy dated December 27th, 1890, by the terms of which the defendant company, in consideration of the annual payment of $1,060 November 11th, each year, insured the life of Frank C. Johnson for $25,000 (p. 1).

Johnson paid the premiums down to and including November 11th, 1892. He did not pay the November 11th, 1893, premium, or any subsequent premium (p. 8). He died September 28th, 1896 (p. 7).

Pursuant to Johnson's application, the Company, January 20th, 1893, extended to said policy the benefits of the accumulation policy plan of said defendant, and delivered to him a certificate to that effect (p. 9). By said policy, as modified by said accumulation certificate, it was provided that "If the premiums are paid to November 11th, 1893, the insurance of $25,000 will be extended to May 11th, 1896" (p. 18).

Said contract, as modified by said accumulation certificate, contained the following benefits (p. 18):

"NON-FORFEITURE.—After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on ac-

count of this policy, (1), the insurance will be extended for the face amount, as provided in the table below:

"If the premiums are paid—				The insurance of $25.000 will be extended—			
To	November	11th,	1893	To	May	11th,	1896
"	"	"	1894	"	January	"	1899
"	"	"	1895	"	August	"	1901
"	"	"	1896	"	"	"	1903
"	"	"	1897	"	"	"	1905
"	"	"	1898	"	May	"	1907
"	"	"	1899	"	February	"	1909
"	"	"	1900	"	August	"	1910
"	"	"	1901	"	January	"	1912
"	"	"	1902	"	May	"	1913
"	"	"	1903	"	June	"	1914
"	"	"	1904	"	July	"	1915
"	"	"	1905	"	"	"	1916
"	"	"	1906	"	June	"	1917
"	"	"	1907	"	March	"	1918
"	"	"	1908	"	November	"	1918
"	"	"	1909	"	July	"	1919"

The Petition.

The plaintiff brought her suit on said policy as originally written, omitting all mention of the benefits of said accumulation policy plan the insured had applied for and received.

After setting forth the terms of the original policy in the usual form of a petition on an insurance contract, she alleged that Johnson died September 28th, 1896, and that by the New York laws under which said policy was written it was provided that, "No life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or in-

terest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

The petition also states that the notice referred to in the above New York statute was never sent. There-

fore, the plaintiff claimed the policy continued in force, notwithstanding the premiums had only been paid to November 11th, 1893, and notwithstanding the terms of the policy as modified by the accumulation certificate.

The Answer.

In its answer, the defendant, for its first defence, raised an issue of the jurisdiction of the court (p. 7).

For its second defence, the defendant denied all the allegations of the petition, except that it was a New York corporation (p. 8).

For its third defence, the defendant admitted the making of the policy in question, and set forth the fact of the insured's application for the benefits of the defendant's accumulation policy plan, and the nature of said benefits, the payment of premiums to November 11th, 1893, and no later, thereby extending the insurance to May 11th, 1896; and averred "that on said last named date said policy expired by limitation" (p. 8).

For its fourth defence, the defendant admitted the making of the policy in question, and averred that the notice law of 1877 set forth in the plaintiff's petition was supplanted by a subsequent notice law passed in 1892, and that pursuant to said 1892 law the defendant duly sent the notice in respect to the November 11th, 1893, premium; that said premium was not paid, and that thereupon the benefits of the accumulation policy thereby became operative, extending said insurance to May 11th, 1896, and "that on said last named date said policy expired by limitation" (p. 9).

The Reply.

The reply averred that the benefits of said accu-

mulation policy plan were merely those extended by a New York statute therein described, and denied all the allegations of the answer.

II

Verdict and judgment for the defendant, because the New York notice law did not apply to the policy.

At the conclusion of the trial on its merits, the defendant moved the court to instruct the jury to return a verdict for the defendant, because "The testimony in writing conclusively shows that whatever policy Frank C. Johnson ever had with the defendant, certainly had expired by limitation on the 11th of May, 1896" (p. 73).

The court sustained this motion, because the policy, as modified by the accumulation certificate, "Thereby becomes non-forfeitable (p. 76). * * * This accumulation policy provided that the insurance should terminate in case payments were discontinued, May 11th, 1896. Payments were discontinued. The decedent died in September, 1896, and under the conditions of the accumulation policy his insurable interest had expired" (p. 78).

III

The Iowa Supreme Court affirmed the judgment, because the New York notice law did not apply to this policy.

In their opinion, after referring to the New York notice law and the decisions of New York and other states construing it, the Supreme Court of Iowa say, 'We do not understand that the general principles:

announced in these cases are disputed by the appellee. Its contention is that they have no application to the contract here involved, because the policy sued upon was at the request of the assured converted into a paid-up policy for a fixed term, which term expired before the assured died. Several further defences are urged, but the conclusion we reach on the one just stated renders it unnecessary that we consider the others" (p. 101).

After the above statement of the point to be decided, and a full consideration of all the New York statutes and decisions relied upon by the appellant, the court in their opinion then took up the specific terms of this policy. After stating the terms of the policy, as modified by the accumulation certificate, the court said: "What was the effect of this new contract? If it converted Johnson's policy into a contract for paid up insurance, then no notice was necessary. The notice is for the benefit of the assured. It would avail him nothing when no act of his would enable him to continue the policy in force. The language of the statute is plain enough on this point. Notice is required only as a basis for requiring a forfeiture or lapse of a policy for non-payment of premium or interest. Where the term expires for which the risk is taken, there is neither a forfeiture nor a lapse" (p. 103).

Having fully discussed the terms of the accumulation certificate, the court concluded by saying: "By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11th, 1893, became transmuted into a paid-up policy, ending May 11th, 1896 (p. 104). * * The notice is required only when it is sought

to declare a contract forfeited or lapsed. Neither was done here. (p. 104).

"Our conclusion is, that this was a policy for a term that expired before Johnson's death, and therefore plaintiff has no right of recovery. The other questions discussed are rendered immaterial by this finding. Affirmed"—(p. 105).

IV

The Iowa Supreme Court's construction of this contract and of the New York notice law, does not deny to the New York laws the full faith and credit which the constitution and laws of the United States demand in order to give this court jurisdiction on writ of error.

1. The issues in the case required the Iowa court to construe this policy, and to determine the operation and effect of the New York notice law in respect to it. The court did this, and according to its best judgment the New York notice law was not applicable to the policy.

2. Nor did the Iowa court's conclusion deny full faith, credit, and effect, to any of the decisions of the New York courts.

There is not now, nor ever has been, a decision by the courts of New York holding, or in any way indicating, that this notice law is applicable to a policy like the one in question, which agrees that if the premiums are paid to a certain date the insurance for the full amount named in the policy will be extended to a certain other date from three to ten years—depending upon the particular date to which the premiums are paid—beyond the date of payment.

In *Baxter v. Brooklyn Life Ins. Co., 119 N. Y., 450* (Record, p. 28), which the plaintiff pleaded, proved, and relied upon, the policy was an ordinary forfeitable policy. It was not a non-forfeitable policy of term insurance. The court held, that the notice law was applicable to it; that the burden of proving the sending of the notice was on the insurance company; and that as the defendant had failed to offer any proof of notice, it was not error to deny its motion "For a non-suit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium".

In *Rowe v. Brooklyn Life Ins. Co., 16 Misc. R. 323* (Record p. 32), it was agreed that "The policy shall cease and be null and void if the premium or premium notes are not paid when due. The company sent the notice, but the "Notice did not state the correct amount due on the policy, but stated a considerably larger amount than was due". And so the court held that "The notice was not, therefore, the statutory notice", and was not sufficient to forfeit the policy for non-payment of premium.

Sands v. New York Life Insurance Company, 50 N. Y., 626 (Record, p. 61), was decided in 1872, before the New York notice law was passed. The premium due January 20th, 1862, was paid in confederate money, which was received by the general agent of the company as payment. The insured died in July, 1862. The court held, that the payment in confederate money under the circumstances did not forfeit the policy. Nor did the civil war nullify it.

Cohn v. New York Mutual Life Insurance Company, 52 N. Y., 610 (Record, p. 62), was decided on the prin-

ciple announced in *Sands v. New York Life Insurance Company*; that is, that the civil war did not avoid this sort of contract.

Wyman v. Phoenix Ins. Co., 45 Hun., 145 (Record, p. 63), is the only other case the plaintiff put in evidence. It was "Agreed in the policy that it should be null and void" in case any premium or premium note should not be paid when due. The premium that matured October 25th, 1884, "Was not at that time paid, and because of that failure to pay the policy by its own terms was declared forfeited." The court held, that because of a reinstatement of the policy in April, 1884, it was then "renewed," and thereafter became subject to the notice law, and was "incapable of forfeiture without the service of notice."

The foregoing are all the cases the plaintiff put in evidence.

The defendant put in evidence the case of *Carter v. Brooklyn Life Ins. Co., 110 N. Y., 15*. The purpose of putting this decision in evidence was to show that if any notice law at all applied to the policy in question, it was the 1892 notice law pleaded in the defendant's answer (p. 12); for the Carter case held that "The payment and receipt by the company of each annual premium constituted a renewal of the policy within the meaning of the word 'renewed' as used in the act."

The foregoing are all the decisions that were put in evidence on this trial. Certainly it cannot be claimed that any one of them construes or relates to a policy that on its face purports to be non-forfeitable, and that contains a table of dates to which the insurance for the full amount named in the policy will be extended if the premiums are paid to certain other dates. No one of

them relates to a non-forfeitable policy of term insurance, or indicates that the New York notice law is applicable to such a policy.

Therefore, there being no construction of a policy like this by the New York courts, and no construction of the New York notice law applicable to a policy like this, it devolved upon the Supreme Court of Iowa in this case to construe both the policy and the New York notice law with respect to the policy; and having done so, its judgment is final, and cannot now be re-examined on the ground that the Iowa court failed to do the very thing this whole record shows it most faithfully did do.

The record shows on its face that the Iowa court full and carefully considered and construed the New York notice law and all the New York decisions brought to its attention, and that after giving to each and all of them full faith, credit, and effect, the court concluded that the "Notice is required only as a basis for declaring a forfeiture or lapse of a policy for non-payment of premium or interest" (p. 103); hence, that the notice law had no application to this policy, because it was a non-forfeitable policy of term insurance, which had expired by limitation before the insured died.

3. Whether the Iowa court was right or wrong in its construction of this contract and in its application of the New York laws, is not material here. If it gave full faith and credit to the New York laws, then this motion should be sustained, whether its judgment of the meaning of this contract and of the operation and effect of the New York laws was erroneous or not.

If this court were to retain jurisdiction of this case,

it is clear that the question to be determined would be not whether or not the Iowa court had given full faith and credit to the laws of New York state, but whether or not the Iowa court had correctly construed this insurance contract and had correctly construed and applied the laws of New York. This court does not acquire jurisdiction on writ of error to the highest court of a state, for the purpose of passing upon the question as to whether or not the state court correctly construed the laws of another state.

Cook County v. C. & C. C. D. Co., 138 U. S., 635.

Glenn v. Garth, 147 U. S., 360.

Lloyd v. Matthews, 155 U. S., 222.

Banholzer v. New York Life Ins. Co., 178 U. S., 402.

Yazoo & Miss. R. R. Co. v. Adams, 180 U. S., 41.

The above decisions, and numerous others of similar import, clearly and conclusively establish the proposition, that where a state court gives a certain construction to a contract governed by the laws of another state, or merely construes but does not deny the validity of the statute of another state, this court cannot take jurisdiction to re-examine, reverse, or affirm the judgment of the highest court of the state on the ground that full faith and credit were denied to the laws of another state, even although this court may be of the opinion that the state court erroneously construed the contract or laws of the other state.

In *Glenn v. Garth, 147 U. S., 360*, the Court of Appeals of New York considered the proper construction and operation of a statute of the State of Virginia,

relating to the evidenciary force to be given to the fact that a party's name appeared as a stockholder on a corporation's books, and held that it was merely *prima facie* evidence of ownership. The plaintiff claimed that a statute of Virginia made it conclusive evidence, and brought the case to this court on writ of error, upon the ground that full faith and credit had not been given to the Virginia statute. In dismissing the case for want of jurisdiction, this court said:

"If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisicdtion would be enlarged in a manner never heretofore believed to have been contemplated."

In *Lloyd v. Matthews, 155 U. S., 222*, the Court of Appeals of Kentucky so construed a statute of Ohio prohibiting an insolvent debtor from preferring a creditor as to limit its application to preferences made in deeds of assignment to trustees for the benefit of creditors generally, and therefore not to apply to the case before the court. The case was brought to this court on writ of error, on the ground that full faith and credit was denied to the laws of Ohio. This court, however, dismissed the writ of error for want of jurisdiction, because it is the settled law that "Where the validity of

a state law is not drawn in question, but merely its construction, no federal question arises."

The late case of *Banholzer v. New York Life Ins. Co., 178 U. S., 402*, supports this motion in every way. In that case it was claimed that the supreme court of Minnesota failed to give full faith and credit to a New York statute. The Minnesota court there, as in this case, fully considered the New York statue in question and all the New York decisions construing it, and after a full consideration of all of them concluded that the notice required by the New York statute "Was not applicable to the notes given by Banholzer for part of the September premium." The case was brought into this court on the ground that the Minnesota court did not give full faith and credit to the statutes and laws of New York. In sustaining a motion to dismiss the writ of error for want of jurisdiction, this court held that the ruling of the Minnesota court "Was a construction of the statute, not a denial of its validity;" and for this reason dismissed the writ of error.

In view of the face of this record, therefore, and the constitution and laws under which the jurisdiction of this court is invoked, and the decisions of this court construing them, it is very clear that this is not a judgment which may be re-examined, reversed, or affirmed by this Honorable Court,and therefore, we submit, the motion to dismiss for want of jurisdiction should be sustained.

Respectfully Submitted,

JAMES H. MCINTOSH,
Attorney for Defendant in Error.

GEO. W. HUBBELL,
Of Counsel.

Omaha, 2 May, 1902.

No. 87.

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

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Br. of Hubbell, McIntosh & McKenney for D.E.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Nov. 12, 1902.

No. 87.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR ON THE MERITS.

GEORGE W. HUBBELL,
JAMES H. McINTOSH,
FREDERIC D. McKENNEY,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-36

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 87.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

NEW YORK LIFE INSURANCE COMPANY,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS.

The defendant in error has heretofore filed a motion to dismiss this writ of error for want of jurisdiction. If, after considering said motion and the argument supporting it, the court should conclude the same are not well founded, we would then ask consideration of this brief on the merits of the case.

STATEMENT OF THE CASE.

The plaintiff in error's statement of the case omits so much we deem material to the issues here that we feel we must more fully state the facts.

are briefly stated at pages 5, 6, and 7 of our brief in support of our motion to dismiss, and need not here be more fully stated.

The Facts in the Case.

THE APPLICATION FOR THE POLICY.

On December 18, 1890, Frank C. Johnson, at Randolph, Iowa, applied in writing to the New York Life Insurance Company for a policy on his life in the sum of $25,000 (p. 35). The application was made to E. C. Smith, the company's soliciting agent at Council Bluffs, Iowa (p. 7). At the time of the application and thereafter Johnson resided at Randolph, Iowa, and Omaha, Nebraska (p. 35), having, however, removed his family from Randolph to Omaha in 1889 (p. 68); but he owned and conducted a bank in Randolph for a long time prior to the removal of his family from there to Omaha, down to September, 1895 (p. 68).

This application contained agreements for a surrender value in paid-up insurance, in consideration of which the applicant agreed to "waive, in case of lapse or forfeiture, all right to any other surrender value provided for by the statute of any State or country," and specifically to waive the provisions of chapter 347 of the Laws of 1879 of the State of New York.

The application further contained this provision:

"That the contract contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

The company duly accepted this application, and on January 15, 1891 (p. 56), delivered to Johnson, in the State of Iowa, at Council Bluffs, through its soliciting agent there, E. C. Smith, a life-insurance policy for $25,000, conditioned upon the annual payment, November 11 each year, of a premium of $1,060 (p. 2).

The Policy.

That part of said policy material to this suit was in words and figures as follows:

"Number 385,048. Amount, $25,000.

"The New York Life Insurance Company, by this Policy of Insurance,

Age, 44.
Annual premium,
$1,060.00

Notice—In consideration of the stipulations in case of lapse specified in the policy, the provisions of chap. 347 of the Laws of 1879 of the State of New York have been waived in the application for this policy.

"In consideration of the agreements, statements, representations, and warranties submitted to its officers at the home office, in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of fourteen hundred and fifty-five dollars and — cents, to them in hand paid, at the office of the company in the city of New York (being the premium for two years' term insurance), and of the annual payment of one thousand and sixty dollars and — cents (being the life premium), to be paid at said office on or before the eleventh day of November, in every year during the continuance of this policy, commencing on the 11th day of November, 1892,

"Doth insure the life of Frank C. Johnson (banking) of Randolph, in the county of Fremont, State of Iowa, (hereinafter called the insured), in the amount of twenty-five thousand dollars, commencing on the eleventh day of November, 1890, at noon.

* * * * * * *

"This policy is issued and accepted upon the following express conditions and agreements.

* * * * * * *

"Second. That if any one of the premiums is not paid as hereinafter provided, on or before the day when due, then this policy shall become void, and all payments previously made shall remain the property of the company, except that if this policy shall lapse, or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums, as above specified (that is to say, the premium for four years' of insurance) a paid-up policy will be issued, on demand made within six months after such lapse, with surrender of this policy, under the same conditions as this policy, except as to payment of premiums, but without participation in profits (and without mortuary dividend) for such an amount as the net reserve on this policy at the time of lapse computed by the American Table of Mortality, and interest at four and one-half per cent., after deducting all indebtedness to the company, will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse; and all right to any other paid-up policy or surrender value, provided for by the statute of any State or country, is hereby waived.

* * * * * * *

Risks not assumed. "This policy does not insure against death occurring while engaged in military or naval service in time of war or in consequence of such service, nor against death in consequence of a duel or violation of law. In any such case the policy shall be null and void; but on its surrender within six months thereafter, with satisfactory proofs of death, the net reserve (computed by the American Table of Mortality and interest at four and one-half per cent.), after deducting all indebtedness to the company, will be paid therefor.

* * * * * * *

Payment of premiums. "All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president,

vice-president or actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice, or the acceptance of any premium after it is due, is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due."

Notice when due.

PREMIUM PAYMENTS AND THE CONVERSION OF THE POLICY INTO AN ACCUMULATION POLICY.

Johnson duly paid to the company's soliciting agent, E. C. Smith, at Council Bluffs, Iowa (p. 59), the first payment named in the policy, being the premium for two years' term insurance; and also, at the same place, duly paid the annual premium that matured November 11, 1892; but he never thereafter made, nor offered to make, any other or further premium payment on this policy (p. 57).

December 10, 1892, Johnson, at Omaha, Nebraska, through the company's agent there, made application to the defendant in writing as follows (pp. 58, 56, and 16):

"OMAHA, NEB., *Dec. 10th*, 1892.

"The New York Life Insurance Co. is hereby requested to extend the benefits of its accumulation policy to policy No. 385,048, issued by the said company on the life F. C. Johnson, with the understanding, that, except as modified by such benefits, said policy shall remain unchanged.

"F. C. JOHNSON,
"*Beneficiary Insured.*

"E. C. SMITH, *Witness.*"

This application for the extension of the benefits of defendant's accumulation policy to Johnson's policy was duly received by the defendant at its home office, was accepted by it, and under date of January 20, 1893, the defendant

issued and delivered to Johnson, at Omaha (p. 72), a certificate, duly certifying that the benefits of its accumulation policy plan had been extended to his policy (p. 57). This certificate was among the papers turned over to the plaintiff at the time she claims he assigned to her the policy in question, in November, 1895 (pp. 34, 66, 67); and at the trial of this case plaintiff, upon demand, produced the certificate, and the defendant put it in evidence (p. 88).

The special benefits thus extended to Johnson's policy, as shown by this accumulation certificate, were numerous, and widely changed the policy from what it was as originally written. The changes especially material to the present issue were as follows (p. 16):

"NEW YORK LIFE INSURANCE COMPANY, 346 BROADWAY, NEW YORK.

"This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. Johnson, the benefits of the accumulation policy plan of the New York Life Insurance Company are hereby extended to said policy, as stated on the next page.

"It is understood and agreed that, except as herein expressly modified, the terms of said policy No. 385,048 remain unchanged.

* * * * * * *

Incontestability. "This policy is not subject to any conditions or restrictions as to travel, residence, occupation, or manner of death.

"After this policy shall have been in force three full years,

Non-forfeiture. in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months, upon pay-

ment of the overdue premium with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing.

"TABLE OF GUARANTEES IF PAYMENT OF PREMIUMS IS DISCONTINUED,

"Provided there is no indebtedness against the policy.

("Pursuant to the insurance law, chapter 690, Laws of 1892 of the State of New York.)

If the premiums are paid.	(1) The insurance of $25,000 will be extended	or (2) The policy may be converted into paid-up insurance
To Nov. 11, 1893,	to May 11, 1896,	of $1,825
" " " 1894,	" Jan. " 1899,	" 3,045
" " " 1895,	" Aug. " 1901,	" 4,225
" " " 1896,	" do. " 1903,	" 5,250
" " " 1897,	" do. " 1905,	" 6,175
" " " 1898,	" May " 1907,	" 7,125
" " " 1899,	" Feb'y " 1909,	" 8,075
" " " 1900,	" Aug. " 1910,	" 9,000
" " " 1901,	" Jan. " 1912,	" 9,750
" " " 1902,	" May " 1913,	" 10,500
" " " 1903,	" June " 1914,	" 11,175
" " " 1904,	" July " 1915,	" 11,825
" " " 1905,	" July " 1916,	" 12,400
" " " 1906,	" June " 1917,	" 12,900
" " " 1907,	" M'ch " 1918,	" 13,250
" " " 1908,	" Nov. " 1918,	" 13,700
" " " 1909,	" July " 1919,	" 14,025

"Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance, on the same basis as that on which the above table is constructed."

In considering this policy, as changed by the accumulation benefits evidenced by the foregoing certificate,

It is Important to Note

1. That Johnson applied for the benefits of the defendant's accumulation policy on December 10, 1892 (pp. 7, 16), being the last day upon which he might pay, and probably the day upon which he did pay, the premium that matured November 11, 1892 (p. 4).

2. That it was upon Johnson's own written request, made December 10, 1892, and within the limit of the one month's grace for the payment of the November, 1892, premium, that his ordinary forfeitable annual policy on his life was converted into this non-forfeitable accumulation policy.

3. That this accumulation policy was materially different from and more valuable to the insured than the insured's original policy.

4. That the provisions in the original policy making it void for non-payment of premium were annulled by that stipulation of the accumulation policy which provided that for each premium payment the insurance of $25,000 would be extended to a specific date years beyond the time to which the payment would have carried it, if the policy had remained as originally issued, a forfeitable policy.

5. That the November 11, 1892, premium was the last premium Johnson paid, and that by it, under the terms of the accumulation policy, his life became insured for $25,000 for a term that ended May 11, 1896.

6. That in the accumulation policy the annual payment of the premium continued to be the consideration necessary to be paid for an extension of the insurance from term to term, but a failure to pay the annual premium did not under the accumulation policy render the insurance void

or voidable, as in the original policy, but, on the contrary, extended the insurance for the full face of the policy to a specific date, and gave the insured the full benefit of all the insurance the money he paid would buy.

JOHNSON'S DEATH AND THE COMMENCEMENT OF THIS SUITS

Johnson died September 28, 1896, more than four month. after his insurance term had expired.

February 20, 1897, the plaintiff tendered the defendant $3,615, being the annual premiums on this policy, commencing with the premium due November 11, 1893, with interest. The company refused the tender. Thereafter, and on November 19, 1897, the plaintiff commenced this suit.

THE GROUND UPON WHICH THE PLAINTIFF SEEKS TO RECOVER.

The plaintiff brought this action on the original policy, not on the accumulation policy. The accumulation policy the plaintiff ignored, leaving it to the defendant to aver and prove the exact nature and extent of the contractual relations between these parties.

The plaintiff did not claim that any payment was ever made, or offered to be made, of any premium on this policy after the premium that became due November 11, 1892, but admitted that no premium was thereafter ever paid.

The plaintiff did not claim that Johnson died within the period of his extended insurance, but averred that he died September 28, 1896, three years, ten months, and eighteen days after he paid the last premium that he paid, and four months and thirteen days after the term of his extended insurance had expired.

Bringing this suit on the original policy, the plaintiff claimed that the policy was still in force when Johnson

died; that although the original policy, by its terms, was forfeitable for non-payment of premium, it could not, in fact, be forfeited by the company, until the company first showed that, in compliance with the 1877 statute of New York in respect of life-insurance policies forfeitable for non-payment of premium, in force when the original policy was taken out, it mailed to the insured at his last known post-office address, at least thirty and not more than sixty days prior to the day when the premium was payable, a notice stating the amount of such premium, the place where it should be paid, and that unless such premium should be paid within thirty days after the mailing of such notice the policy and all payments thereon would become forfeited and void.

The defendant in error claims:

First. That the Iowa court gave full faith, credit, and effect to the New York laws.

Second. That the Iowa court, in its application of the New York laws and in its construction of this policy, was right in holding that the law, requiring notice "only when it is sought to declare the contract forfeited," was not applicable to this policy, because by failure to pay the annual premium the policy could not thereby become either void or voidable, forfeited or forfeitable, but stood as insurance for a specific term, which expired before Johnson died.

Third. That Johnson abandoned his insurance contract, except as the policy continued in force until May 11, 1896, as a policy of term insurance.

Fourth. That if it were necessary to notify the insured that upon failure to pay the premium when due his policy would be forfeited and void, when, as everybody knew, it would not and could not be so forfeited, then, as matter of fact and as an agreed courtesy, notice was duly sent.

BRIEF OF THE ARGUMENT.

First Point.

The Iowa court gave full faith, credit, and effect to the New York laws.

For our argument on this point we beg to refer to our brief in support of our motion to dismiss this writ of error for want of jurisdiction.

An inspection of the opinion of the Iowa court, found in the record at page 99, discloses not merely that the Iowa court in its decision gave full faith and credit to the New York laws, but also that it fully and carefully considered those laws and all claims the plaintiff made for them, and as a result arrived at the conclusion that the plaintiff had no right of recovery because such laws did not apply to this policy.

If the Iowa court was wrong, it was wrong, not because it failed to give full faith, credit, and effect to the New York laws, but because it erred in applying the New York laws and in construing this policy. As the opinion shows, that court gave its entire consideration of the case, first, to the meaning, scope, and intent of the New York laws; secondly, to the real nature and character of this contract, its duration and its limitations; and then, applying the New York laws as it understood them to this policy as it construed it, concluded that "the notice is required only when it is sought to declare the contract forfeited or lapsed," and therefore, that the law did not apply to "a policy for a term that expired before Johnson's death." Even if this were error, still this court will not take jurisdiction to correct the error.

Glenn *vs.* Garth, 147 U. S., 360.

Lloyd *vs.* Matthews, 155 U. S., 222.

Banholzer *vs.* New York Life Ins. Co., 178 U. S., 402.

Second Point.

The Iowa court in its application of the New York laws and in its construction of this policy was right in holding that the law requiring notice "only where it is sought to declare the contract forfeited" was not applicable to this policy, because by failure to pay the annual premium the policy could not thereby become either void or voidable, forfeited or forfeitable, but stood as insurance for a specific term, which expired before Johnson died.

1. The plaintiff bases her claim on the New York notice law of 1877, section 1 of which is printed at page 2 of the plaintiff's brief. The plaintiff, however, omits to print section 2 of this law, which is as follows:

"Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given" (pp. 10, 58).

2. The Iowa court understood this law to apply to policies that the company had "power to declare forfeited or lapsed." It did not believe the New York legislature intended to require life insurance companies to send each holder of a non-forfeitable policy a threatening notice, therein falsely stating "that unless the premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect said premium within thirty days after the mailing of said notice the said policy and all payments thereon shall become forfeited and void."

Why require the company to send to the policy-holder a notice stating that if his premium is not paid when due "the policy and all payments thereon will become forfeited and

void" if this is not, and cannot be made, true? Why require the company to threaten to forfeit a policy that the company has agreed shall be non-forfeitable? Why require the company to say that its contract shall become forfeited and void, when the company not only knows it will not, but knows it cannot, and also intends to stand by its agreement as made, recognizing it and abiding by it until the end of the insurance term named in the contract?

The only reasonable answer to these inquiries is the answer the Iowa court gave,—the New York law made no such requirement. The New York law applied only to policies that were forfeitable, and by the forfeiture of which the company usually made a profit and the insured suffered loss, and not to policies that could not be forfeited, but that at any and all events remained in force to give the insured every hour of insurance the money he had paid would buy.

3. Johnson's original policy was forfeitable for the non-payment of premium, but when, on his application, it was changed into the defendant's accumulation policy contract, then it became a policy which gave insurance for the specific term in consideration for each premium paid.

The orginal policy provided (p. 2) that "if any one of the premiums is not paid as hereinafter provided on or before the day when due, then this policy shall become void, and all payments previously made shall remain the property of the company." Thus, in its original form, it was of the class of policies to which the New York notice law referred by requiring the notice to advise the insured that "the policy and all payments thereon will become forfeited and void," if the premium is not paid when due.

But when Johnson, on the 10th of December, 1892, applied to the company to have his policy converted into an accumulation policy, his contract with the defendant then was that, if he elected to make no further premium payments on it, the policy should not become void, but the in-

surance of $25,000 would continue in force until May 11, 1896; and if he should pay the next premium, and then chose to make no further premium payment on it, his contract should not become void, but the insurance of $25,000 should be extended to January 11, 1899. And so on, according to the table of benefits, each payment extending his insurance to a stated period, his policy not becoming void, but continuing the insurance for its full face until the end of the term designated in the table of benefits.

These provisions for extension of the insurance were expressed in the policy under the heading "Non-forfeiture."

4. Can it be said, then, that the condition in the original policy by which the policy was to become void for the non-payment of any premium when due had any meaning, force, or effect, after this original contract between the parties was so changed by them as that each premium payment purchased insurance, not for a year merely, but for different, specified periods of time, amounting at the time of the change in the contract to two years and a half? Surely not. The accumulation certificate expressly modified the original policy in a variety of its features. This annulment of the forfeiture clause of the original policy was one of the most important modifications it made.

The policy, as modified by the accumulation certificate, was, then, precisely what the parties to it agreed it should be. It was what on its face it purported to be. It was a non-forfeitable policy. For each payment of premium Johnson's life thereby became insured to a specific date. The policy stood as insurance on his life until that date, and could not be forfeited or avoided by any act or omission of either party before the term expired to which the insurance was extended by virtue of the premiums paid.

And this suggests one of the special errors responsible for the plaintiff's persistency in this case. At page 23 of the plaintiff's brief it is said, "the company says it will not now

pay this loss because Johnson failed to pay the premium which fell due November 11, 1893." This is not what the company says at all. What the company says is, that it will not pay this demand because the insurance on Johnson's life expired May 11, 1896, and Johnson did not die until after that. To be sure, if Johnson had paid the premium that fell due November 11, 1893, the company would have promptly paid the amount of the insurance, because the term of his policy would then have been extended to January 11, 1899, and the insurance would have been in force at the time of his death. But if I fail to renew the insurance on my house that runs to January 1, 1903, and my house burns down February 1, 1903, do I have a claim on the company? Of course I do not, because my insurance expired before my loss. So it was with Johnson. He had insurance down to May 11, 1896, but the term expired before the loss occurred. He lived until September 28, 1896.

5. Of no sort of contract other than an insurance contract, against no party to a contract other than an insurance company, would it ever be seriously urged that a provision in a contract by which it was agreed that it would become void if one of the parties to it should fail to perform a condition subsequent continued to be a part of the contract, or that the contract was any longer a forfeitable contract, if by a subsequent modification of it the parties agreed that a failure to perform that condition subsequent should leave the contract in force and extend the period of its duration to a distant subsequent date.

Why make this exception of an insurance contract and against an insurance company? To be sure, an insurance contract is usually made on the company's own form, which is sometimes voluminous and may be overstrict in its terms. In such cases it is fair and right, in the interests of justice and fair dealing, to construe the policy, in case of doubt, most strongly against the company.

But does this rule obtain in respect of a policy such as this, that is definite and clear in its terms, that is conditioned at any and all events to give to the insured the full worth of his money, every hour and every dollar of insurance that he ever paid for, and in favor of one who for more than three years never paid nor offered to pay any sum whatever on his insurance contract, and of whom it is not now nor ever has been claimed that he desired or intended or was willing to pay another dollar?

The clause of this accumulation policy by which it is provided that "if the premiums are paid to November 11, 1893, the insurance of $25,000 will be extended to May 11, 1896," is certainly very clear and unambiguous. Whatever, therefore, the rule may be as to the construction of doubtful terms in a policy, the contract, where its meaning is clear and unambiguous, is to be construed by the same rules of construction as apply to other instruments. "Its language is to receive a reasonable interpretation. Its intent and substance as derived from the language used should be regarded. In such cases, as in all others, the subject of the insurance, its nature and extent, are to be ascertained from the words of the contract which the parties have made."

Imperial Ins. Co. *vs.* Coos County, 151 U. S., 452.
Dwight *vs.* Life Ins. Co., 103 N. Y., 431.
Lewis *vs.* United States, 92 U. S., 618.
Brady *vs.* Cassedy, 104 N. Y., 147.
Powell *vs.* Life Association, 50 Vt., 630.
Universal Life Ins. Co. *vs.* Devore, 14 S. E., 532 (Va., Feb., 1892), and numerous cases therein cited.

Therefore the learned trial judge was strictly within the limits of established rules for the construction of contracts of this kind when, in construing this policy in the light of the situation of the parties to it, he said (p. 78):

"But neither the insurance laws, nor the provisions of the policy, ought to be so construed as to make it an inducement

to parties not to pay their premiums, and to require parties, who in good faith continue to pay their premiums and keep up their policies, to make up the loss which is sustained by reason of the willful default of persons who deliberately conclude not to abide by the conditions of the policy. The default in this case was not a mere accidental one. There is no evidence that it resulted from any failure of notice. There is nothing in the situation of the plaintiff's intestate, as it seems to me, to recommend him to the special consideration of the court. His premium fell due on the 11th of November, 1893. For nearly three years thereafter he failed to pay his premium or to make any offer of the same, or to do anything which evinced his desire or intention or his wish to keep this policy in force. For this court now to hold that the plaintiff should be paid this insurance, would be, in my judgment, simply throwing an unwarranted burden upon parties who have complied with their contracts, and putting a premium or a special privilege upon the failure of the insured to comply with the agreement upon his part."

6. From the plaintiff's argument, it necessarily follows that a policy of term insurance really could not be written by a New York company; for the plaintiff insists, that to make this policy a policy for a term the insured must first be put in default, which could only be done by sending the notice.

(*a.*) This view ignores the plain terms of the policy. The policy does not say that if the insured shall be put in default so as to entitle the company to forfeit the policy, then the insurance of $25,000 will be extended to May 11, 1896. The policy says, "if the premiums are paid to November 11, 1896, the insurance of $25,000 will be extended to May 11, 1896."

By the plain terms of the policy, therefore, the extended insurance became operative when the premiums were paid to November 11, 1893, without any notice whatever or other act of any kind by either party.

(*b.*) Notwithstanding the terms of the policy, the plaintiff argues that this notice law was a part of it, because the New York court in construing the policy in the Baxter case, which provided that "this policy shall be void if any premium or part of a premium be not paid when due," and in applying this notice law to it, declared "that this statute was a part of the contract in question and covered by the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

In answer to this, we do not deny that the laws of a State where a contract is made may become a part of the contract. We insist, however, that this rule only applies where the contract is of the very kind as well as class to which the law relates. For instance, in every State are special laws relating to negotiable paper. Does it follow from this that the laws of each State relating to negotiable paper become a part of every contract made therein promising to pay money?

And so, when it is insisted that the New York notice law, because it was applicable to the policy in controversy in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, is therefore applicable to this policy, it must be borne in mind that the Baxter policy was to become void if the premiums were not paid when due, whereas this policy, upon the insured's application, was converted into a non-forfeitable policy, insuring for a specific term; that the question before the court in the Baxter case related to the construction of the notice law, whereas in this case it relates to the construction of this policy and to the application of that law; that in the Baxter case the only point before the court was as to whether non-payment of premium was a complete defense to a forfeitable policy, without also proving the sending of the notice, whereas in this case the defense was that the policy had expired, not that it had been forfeited. Hence, that the notice law may have been appli-

cable to the policy in controversy in the Baxter case is no better reason why it should therefore be applicable to this policy than the fact that a law relating to negotiable paper must on that account apply to another and different form of contract for the payment of money.

The Iowa court, therefore, in its construction of this policy, was right in holding that is was a policy for a term, and that when the term expired for which the risk was taken there was neither a forfeiture nor a lapse. For the accumulation policy annulled that part of the original policy by which it was provided that in case of non-payment of premium it should become void. The accumulation benefits converted the policy into a non-forfeitable policy, which, in case of non-payment of premium, became neither void nor voidable, forfeited nor forfeitable, but which thereafter stood as insurance for a specific term that had expired before Johnson died. And there is no escaping this plain and necessary construction of the contract either by generalizations of any kind, or by ignoring the real engagements of the parties, or by confusing this contract with the decisions of the New York courts construing other contracts substantially unlike it. The nature and extent of the rights and engagements of the parties to this agreement clearly and unmistakably appear by the language they have used in it, and it all shows that when Johnson died his policy had long before expired.

Third Point.

Johnson abandoned his insurance contract, except as the policy continued in force until May 11, 1896, as a policy of term insurance.

1. Johnson must have known when his premium became due. The insurance contract fixed that, and he was a party to it. Besides, he expressly agreed in the policy by it to take "notice that each and every payment of premium is

due at the date named in the policy." He paid the 1892 premium when due (p. 25). Besides, the 11th of November is a date which he must particularly have had in mind, because, although applying for the policy December 18, he requested in his application to have the insurance contract made as of the 11th of November (p. 37). He did this to give himself the benefit of the premium rate applicable to age forty-four, for he was born May 12, 1846 (p. 35). By taking the policy out November 11 he would have the benefits of the premium upon a policy taken out by a man of forty-four years of age instead of forty-five.

Again, this policy came particularly to his attention in November, 1895, for, on the 15th day of that month, he executed an assignment of the policy to his wife (p. 34), so that the failure to pay premiums after 1892 could not have been accidental or a mere inadvertence.

2. Moreover, the trial court practically found that Johnson had abandoned his policy; for in the court's opinion sustaining the defendant's motion for an instruction the trial court said (p. 78):

"The default in this case was not a mere accidental one. There is no evidence that it resulted from any failure of notice. There is nothing in the situation of the plaintiff's intestate, as it seems to me, to commend him to the special consideration of the court. His premium fell due on the 11th day of November, 1893. For nearly three years thereafter he failed to pay his premium or to make any offer of the same, or to do anything which evinced his desire or his intention or his wish to keep this policy in force."

If the point now under discussion is one proper to be considered by this court upon this writ of error, then, we submit, the above finding is conclusive on the question of the insured's abandonment of his policy.

Ashley *vs.* Ryan, 153 U. S., 436.

3. These facts, as shown by this record and as found by the trial court, defeat the plaintiff's right of recovery, whether the New York notice law is applicable to the policy or not; for "there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract, and if they chose to abandon it their action is conclusive."

Mut. Life Ins. Co. *vs.* Phinney, 178 U. S., 328.
Mut. Life Ins. Co. *vs.* Sears, 178 U. S., 345.
Mut. Life Ins. Co. *vs.* Hill, 178 U. S., 347.
Mut. Life Ins. Co. *vs.* Allen, 178 U. S., 351.

Fourth Point.

If it were necessary to notify the insured that if he did not pay his premium when due this policy would be forfeited and void, then as matter of fact notice was duly sent.

1. The company gave Johnson notice of the maturity of the November, 1893, premium, which conformed to the notice law of New York passed in 1892 and in effect at the time of sending the notice.

2. If any New York notice law were applicable to this policy in the fall of 1893, it was the law of 1892 and not the law of 1877, as claimed by the plaintiff.

For convenience we shall here print these two laws together. They are as follows:

Law of 1877.

"Sec. 1. No life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever

any premium or interest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"*Provided, however*, That a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service hereinbefore provided for.

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company in pursuance of said section, shall be presumptive evidence of such notice having been given" (pp. 6, 58).

LAW OF 1892.

"SEC. 92. No life-insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereinafter issued or renewed, and not issued upon the payment

of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given" (p. 12).

It will be noticed that substantially all the difference between these two acts is that by the proviso in the 1877 law the notice is required to be sent "at least *thirty* and not more than *sixty* days prior to the day when the premium is payable," and is required to state to the insured that unless the

premium then due shall be paid within thirty days after the mailing of such notice the policy and all payments thereon shall become forfeited and void, whereas the 1892 act provides that the notice must be sent "at least *fifteen* and not more than *forty-five* days prior to the day when the premium is payable," and must notify the insured that unless the premium shall be paid by or before the day it falls due the policy and all payments thereon shall become forfeited and void; "but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

3. The notice law of 1892 took effect October 1, 1892. The Johnson policy was renewed by the payment of that premium that became due November 11, 1892, and therefore, if any notice law applied to this policy, it was the 1892 law.

First. The Johnson policy was renewed by the payment of the premium that became due November 11, 1892.

(*a.*) The act of 1877 and the act of 1892 are each in terms made applicable to "any policy hereafter issued or *renewed*." The Johnson policy was renewed after the 1892 act went into effect, within the meaning of the word "renewed," as used in both laws.

The case of Carter *vs.* Brooklyn Life Ins. Co., 110 N. Y., 15, involved the single question of the meaning of this word "renewed" in the notice law of 1877.

In that case the annual premiums on a policy issued in 1870 were promptly paid down to October, 1883, "and upon non-receipt of the premium for that date the company declared the policy forfeited, and cancelled the policy on the books of the company. The plaintiff did not give the defendant either prior or subsequent notice of the time when such premium became due, or the place where payable, as provided by chapter 341, Laws of 1876, and amendment thereto

by chapter 321, Laws of 1877. * * * It is contended by the appellant that the act applies only to policies issued or renewed after its passage, and that the policy cannot be said to have been renewed unless it has become forfeited or lapsed and has been afterwards restored or reinstated by the company. * * *

"The payment and receipt by the company of each annual premium constituted a renewal of the policy within the meaning of the word renewed as used in the act."

This Carter case was decided in June, 1888. It was referred to as an authority for the decision of the case of Phelan *vs.* Insurance Co., 113 N. Y., 147. The reasoning of it was approved in the case of Baxter *vs.* Insurance Co., 119 N. Y., 450, and it stands today as the construction given to this word by the highest court of the State of New York.

(*b.*) This construction of the word "renewed" by the highest court of the State of New York will be followed and adopted by this court.

Elmendorff *vs.* Taylor, 10 Wheat., 151.
Cathcart *vs.* Robinson, 5 Pet., 264.
Douglas *vs.* County of Pike, 101 U. S., 677.
Louisiana *vs.* Pilsbury, 105 U. S., 278.
Chicago & A. R. R. *vs.* Wiggins Ferry Co., 119 U. S., 615.
First Nat'l Bk. of Humboldt, *vs.* Glass, 126 U. S., 159.

(*c.*) The judicial construction of the word "renewed" in the Carter case must have been satisfactory to the legislature of the State of New York, because, when, in 1892, it set about to compile the insurance laws of the State, it retained in this act of 1892 the word renewed, which had been so defined in the Carter case.

"The re-enactment of a statute, after a judicial construction of its meaning, is to be regarded as a legislative adoption of the statute as thus construed."

Tuxbury, appellant, &c., 67 Me., 297.
The Abbotsford, 98 U. S., 440.
Barlow *vs.* Teal, 15 Q. B. D., 403.
Commonwealth *vs.* Hartnett, 3 Gray, 450.
Whitcomb *vs.* Rood, 20 Vt., 49.
Ex parte Banks, 28 Alab., 28.

(*d.*) The plaintiff insists that the statute of 1877 was part of Johnson's policy. If this insistment is true, then we answer, the Carter case and the court's construction therein of the word "renewed" in this statute were also a part of Johnson's policy.

The decisions of the highest court of a State in construing its laws constitute, so far as contract obligations incurred under them are concerned, as much a part of the laws as if the decisions were embodied in the law. As Mr. Justice Field said in Louisiana *vs.* Pilsbury, 105 U. S., 278, at page 294:

"The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it (Christy *vs.* Bridgeon, 4 Wall., 196, and Shelby *vs.* Guy, 11 Wheat., 361). The statute, as thus expounded, determines the validity of all contracts under it. A subsequent change in the interpretation can affect only subsequent contracts."

In Douglas *vs.* County of Pike, 101 U. S., 677, Mr. Chief Justice Waite said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

Hence it follows that in view of the meaning of the word "renewed" in this notice law, as defined by the court of appeals of New York in the Carter case, and the binding force of that definition on other courts, and the conclusiveness and finality of that definition by reason of the fact that the word "renewed," after being so defined in the Carter case, was carried unchanged into the act of 1892, this Johnson policy was renewed by the payment of the November 11, 1892, premium

Second. If any notice law applied to this policy, it was the 1892 law. The slight changes made by the new law could not prevent this.

(*a.*) No one has a vested right in a law or a right to say that a law shall not be changed.

Roggematter *vs.* Railway Co., 41 Ia., 297.
Brady *vs.* Railroad Co., 57 Ia., 393.

(*b.*) The laws in force when a contract is made are subject to change, and if changed they apply as changed to contracts made under the old law, unless the change is of such a nature as materially to impair the obligation of the contract.

Hoffman *vs.* City of Quincy, 4 Wall., 535.
Edward *vs.* Kearsay, 96 U. S., 695.
Antoine *vs.* Greenhow, 107 U. S., 769.
Ceivert *vs.* Lewis, 122 U. S., 284.

(*c.*) This law of 1892 did not so change the former notice law as materially to impair the obligations of insurance contracts made under the old law and to which the old law applied.

A careful reading of the two statutes discloses that the notice to be sent under the law of 1877 was practically in form and substance the same as the notice to be sent under the law of 1892. The difference to be noticed in connection

with this case is the change in the time for sending the notice.

The 1877 act required the premium to be paid "thirty days after the mailing of such notice," or if the notice was sent before the premium became due, it was required to be sent "at least thirty and not more than sixty days prior to the day when the premium was payable." Thus this act of 1877 gave the insured thirty days from the mailing of the notice within which to pay the premium, in order to avoid the penalty of forfeiture.

The act of 1892 required the notice to be sent at least fifteen and not more than forty-five days prior to the day when the premium was payable. "And no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." Thus this act of 1892 also gave the insured thirty days after the mailing of the notice within which to pay his premium. Therefore under the 1892 act the insured had precisely the same benefits that he had under the 1877 act.

(*d.*) This notice law is remedial in its nature, and, like any other remedial law, may be either changed or supplanted by a new law, provided the new law preserves a remedy substantially as good as existed under the old law. The law requires of the insurance company some affirmative act to make the forfeiture operative. It confers a remedy in favor of the insured against arbitrary forfeiture of his policy.

"All acts giving a right of action where none hitherto existed, or preserving or enforcing a right that has hitherto not obtained, or imposing a condition upon the termination of a right, are remedial."

Union Pacific Railroad *vs.* Debusk, 12 Col., 294.
Antoine *vs.* Greenhow, 107 U. S., 769.

The remedy under the law of 1892 is quite as adequate for the protection of the policy-holder as was the remedy

under the old law, and therefore it applies; for either the legal right or the legal remedy may be changed by changed or new laws, provided the change involves no impairment of a substantial right.

Bronson *vs.* Kenzie, 1 How., 310.
White *vs.* Hart, 13 Wall., 645.
Gunn *vs.* Barrie, 15 Wall., 610.
Butler *vs.* Palmer, 1 Hill., 324.
Walker *vs.* Whitehead, 16 Wall., 314.

Hence, when a law under which a contract was made has been repealed, and a new law substituted for it, the question as to whether or not the new law applies to contracts made under the old is controlled by the question as to whether or not the new law, in respect of the validity, construction, discharge, and enforcement of the contract, leaves the contract substantially as valuable to the parties as it was under the old law. If it does, then the new law applies to it and forms a part of it.

(*c*.) The act of 1892 may be treated as a continuation of the act of 1877 and not as a new enactment.

As already stated, the provisions of the two statutes are similar and almost identical. There never was a moment of time since the passage of the act of 1877 when the act was not substantially in force. The 1877 act was repealed by the act of 1892, but the 1892 act did not take effect until October 1, 1892, and so the 1877 act, which was in force until October 1, 1892, became the 1892 act on that day.

The act of 1892 was intended by the legislature as a continuation of such old laws as were substantially embodied in it. In section 282 of that act it was provided (p. 13) that "the provisions of this chapter, so far as they are substantially the same as those of laws existing on September 30th, 1892, shall be construed as a continuation of such laws,

modified or amended according to the language employed in this chapter, and not as new enactment."

Therefore what Mr. Justice Peckham said in Bear Lake Co. *vs.* Garland, 164 U. S., 1, a case to which we especially invite the attention of the court upon this point, is precisely applicable here: "Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modifications continued in the new act."

Therefore, if any notice law were applicable to the Johnson policy, after the payment of the premium that matured November 11, 1892, and the conversion of the policy into an accumulation policy, it was the law of 1892, and not, as claimed by the plaintiff, the law of 1877.

D. But the point as to whether the notice law of 1877 or the notice law of 1892 should be applied to this policy has been precisely decided in the case of Rosenplanter *vs.* Provident Life Insurance Company, 91 Fed. Rep., 728, wherein it was held as follows:

"Laws N. Y. 1877, c. 321, providing that no policy of life insurance should be declared forfeited unless a prescribed notice should be served on the insured, did not become a part of the contracts created by policies subsequently written in the State, so that its repeal impaired the obligation of such contracts, but was merely a regulation for the government of insurance companies, belonging to the class of remedial statutes, which it is competent for the legislature to enact, repeal or amend, making the same applicable to existing contracts, without affecting the obligations of such contracts."

This decision was affirmed in the United States circuit court of appeals, 96 Fed. Rep., 721, wherein it was held that the laws of New York of the year 1877, chap. 631, providing that no life insurance company should declare a policy forfeited for non-payment of premiums until it had

given the statutory notice, did not become a part of the contract of insurance made while it was in force, and the repeal of such a statute was not an impairment of the obligations of the contract.

4. The company sent a notice which conformed to the 1892 notice law.

(*a.*) On the trial the evidence of the sending of this notice was as clear and convincing as the nature of the fact to be proven would admit. We think the proof of it was so persuasive that different minds could not reasonably draw different conclusions from it.

The undisputed evidence shows that on, or a few days before, the 16th day of October, 1893, the Johnson notice (called by the witnesses "renewal notice") of the maturity of his premium due November 11, 1893, was received at the office of G. A. Smith, manager of the defendant's office at Sioux City, Iowa (pp. 51, 92).

As soon as the renewal notice was received from the home office, Anna Phelps Smith and A. A. De Celle, employés in Smith's Sioux City office, "checked said renewal notices off with the policy register, * * * calling off first the number of the policy, then the name of the insured, his address, date due of the premium, and the amount of the premium. * * * I, (De Celle) called off said data from the renewal notice, she (Mrs. Smith) watched the register, and if she found that the said data, as I called it off, corresponded with the data on the policy register, she made a check-mark on the register. The purpose of making this check-mark was in order to prevent mistakes, and in order also to show that we had received the notice in the office for transmission. The check-mark in lead pencil, over the word returned on the registry of policy 385048, page 116 of the policy register, was made at the time that the notice was received for the premium due November 11th, 1893, after the same was called off to Mrs. Smith, and was made by her, and shows that said

notice was received at the office, and corresponded exactly as to name, address, amount of premium, date due of the premium and the number of the policy, with said policy register" (De Celle's testimony, p. 92; Mrs. Smith's testimony, p. 53).

The material portion of the record of the Johnson policy, contained in this policy register, was introduced in evidence as Exhibit 23, and was as follows:

Date of policy.	No. policy.	Insured.	Address.	Premium, date due.	How payable.	Amount of premium.
1890, Nov. 11.	385048	Johnson, Frank C.	Randolph, Ia.	11-11	Annually.	$1060

And in the last column it had a lead-pencil check-mark Mrs. Smith put there when she and Mr. De Celle compared the notice in question with the policy register in October, 1893 (p. 94).

When Mr. De Celle and Mrs. Smith had thus verified the correctness of the renewal notice they then passed it over "to Mrs. Wainand for the purpose of making out a list of the number of the policies and the amounts of the premiums," as shown in the notices (Mrs. Smith's testimony, p. 53; De Celle's testimony, p. 92). After Mrs. Wainand had finished making a list of the number of the policies and the amounts of the premiums from the renewal notices, she then passed them over to E. H. Kruger, whose desk was right beside hers, and whose duty it was to mail the notices (Mrs. Wainand's testimony, p. 50; Kruger's testimony, p. 46; De Celle's testimony, p. 92); and then Kruger "put on the envelope the address, Frank C. Johnson, Randolph, Iowa—put on the address of the insured, No. 385048, as appeared in the policy register at that time—and I addressed the envelope accordingly, and folded the notice, and put it into the envelope, and sealed the envelope, and put a two-cent stamp on the envelope, and delivered it at the post-office—deposited it in the mails at the post-office. I did this for the New York Life Insurance Company. The New York Life Insurance Company paid the postage, and I mailed this

notice on the 16th day of October, 1893" (Kruger's testimony, p. 47; De Celle's testimony, p. 92).

On the same day Kruger mailed this notice, or the next day, he made out, signed, and swore to an affidavit, pursuant to this statute, that the notice required by the notice law had been duly addressed and mailed on the 16th day of October, 1893. The affidavit is full and specific; it has attached to it a blank form of the notice sent, and a memorandum of the number of the policy and the amount of the premium, copied from the renewal notice (Exhibit 31, pp. 44, 45).

The evidence, therefore, of the sending of this notice is not merely *prima facie*, as shown by the affidavit of the clerk who sent it, but the *prima facie* case so made is supplemented by the undisputed testimony of four witnesses and by the records in the office of the company, all tracing this notice from the time it was filled out ready to be sent through the various stages of verification as to substance and form, its due preparation for the mails, mailing it, and preserving the evidence thereof.

(*b.*) What is there in this record to indicate that this notice was not mailed as thus proven? Nothing, absolutely nothing, except that the plaintiff testified that her husband was particular to save all papers, and—

"(By Mr. BREEN:)

"Q. Now, I repeat for the purpose of making up the record the question formerly asked you, of whether or not you made search among the papers of the deceased in an endeavor to find such a notice or letter?

"A. I did. A very thorough search. * * * But I did not find a notice such as the notice here in controversy or any other notice" (p. 69).

Now, the statute does not provide that the insured must receive the notice, nor does it require that the insured must preserve the notice after he does receive it. Mrs. Johnson

says she made a search, and volunteers to say that she made a "very thorough search." She does not say, however, where she searched. Johnson had his residence in Omaha, a business location at a bank in Omaha, and owned a bank in Randolph, Iowa, where he received mails. Mrs. Johnson does not say that she looked in any of these places for this notice, but the plaintiff is satisfied with this conclusion of hers, that she "made a thorough search," without stating as to where or when or how thoroughly she searched, except that the search was made after her husband's decease, which was about three years after this notice was sent.

Under these circumstances, therefore, it cannot be much, if any, evidence, that Kruger swore falsely in his affidavit made at the time he sent the notice, and that the defendant's witnesses, none of them at the time of testifying in defendant's employ except Mr. De Celle, were all mistaken, and that this notice was not sent, because Mrs. Johnson testified that she did not find it in a search she made three years after it had been sent. Johnson probably did not preserve the notice. It was not a paper such as he would be likely to preserve, or as men usually preserve. The most careful of us receive these notices, make a memorandum of the date of payment, then throw the notice into the waste-basket. Johnson had no interest in preserving this notice; his interest was not to preserve it. If, however, he might have preserved it if he had received it, Mrs. Johnson's testimony does not show that the search she made was such as that she would have found it. Her mere conclusion that she made a thorough search is not sufficient to prove that a paper was not in existence and among her husband's effects, which she had no interest in finding, but which, on the contrary, if she had found would, on the plaintiff's theory of this case, have cost her $25,000.

The evidence, therefore, is such as that it would probably have been erroneous to submit the case to the jury on the question as to whether or not this notice was duly sent, if that

point had been in the case; and a verdict against the defendant on that question might well have been set aside.

(*c.*) The notice that was sent fully conformed to the 1892 statute. A blank copy of it appears in Kruger's Exhibit 21 (p. 45), and also in Kruger's testimony (p. 47). We do not understand that any claim is made as to the form or substance of the notice.

(*d.*) The notice was sent to the proper address.

Plaintiff claims that because one of the defendant's agents in Omaha addressed a letter to Johnson in care of the Citizens' Bank of Omaha, in May, 1893, that for that reason Randolph, Iowa, was not Johnson's last known post-office address for the purposes of this policy. *But they do not claim that Randolph was not his post-office address in October*, 1893.

There would be something in this claim of the plaintiff if there had been any change in Johnson's business or residence location between the time that he applied for this policy and the time the notice was sent, in October, 1893. On this question, however, the plaintiff herself testified as follows (p. 68):

"We lived in Randolph, Iowa, before moving to Omaha. We moved to Omaha in the fall of 1889. My husband's business at Randolph was running a private bank. The name of the bank was Randolph bank. He was interested as owner of the bank, and continued to own that bank up to September, 1895, I think.

"Q. He received mail at the bank after he moved away, didn't he?

"A. Yes; his bank mail.

"Q. A letter addressed to Randolph would be drawn out by the bank, wouldn't it, and remain there until he came there and opened it, and transacted the business?

"A. Yes.

"Q. That he did all the time he had his bank there?

"A. Yes. * * *

"He retained the bank at Randolph, and went back and

forth to see how things were going once in a while—once a month, or something like that. * * * (p. 70). When we first moved to Omaha in 1889 we lived at 216 N. 22nd street, and that is where we resided up to my husband's death, and yet."

From this evidence it will be noticed that there was absolutely no change either in Johnson's residence or in his business address from 1889, when he moved to Omaha, down to 1895, when he sold his Randolph bank.

In his application for this policy it is stated (p. 35):

"2. (*a.*) Present residence: Between Randolph and Omaha, county of Fremont, State of Iowa.

"(*b.*) Post-office address: Omaha (California & 16th Sts.), county of Douglas, State of Neb., hereafter."

The application is dated December 18, 1890 (p. 39). At the time the policy was delivered to Johnson he expressed a desire to have the post-office address he had given the company in his application changed (p. 59), and so, on January 15, 1891, he wrote to the company the following letter (p. 56):

"COUNCIL BLUFFS, IOWA, *January* 15, 1891.

"The New York Life Insurance Company will please make the following corrections in an application for an insurance made by me, dated December 18, 1890, and upon which policy No. 385,048 was issued, and for which this shall be held as good and sufficient authority for the making of such corrections.

"The answer to the question No. 2 B should be read as follows:

"Randolph, Iowa, Fremont county.

"FRANK C. JOHNSON."

Now, clearly, if Randolph, Iowa, was Johnson's post-office address January 15, 1891, it was his address October 16, 1893. Between those dates Johnson had not changed either his residence or business location; both remained unchanged

from 1889 to September, 1895. Moreover, if Randolph, Iowa, was not Johnson's post-office address January 15, 1891, the plaintiff is in no position to say so here, because that was the address he gave the company for the purposes of his policy, and it was perfectly competent for him to agree upon whatever address he chose with the company as his post-office address.

Carter *vs.* Insurance Co., 110 N. Y., 15.

And that address would continue to be his post-office address either until he notified the defendant to change it or until his business or residence location changed from what it was when he designated that as his address to some other post-office address and knowledge of the changed address was brought home to the company.

As a matter of fact, from this evidence Johnson had two post-office addresses—one at Omaha and one at Randolph—from the time he first moved to Omaha, in 1889, until he sold his Randolph bank, in 1895; and so when the company sent this notice to that one of his two post-office addresses that he gave it as his address, the company not only sent it to his post-office address, but sent it to his proper post-office address, his last known post-office address, as between him and the company.

In his contract with the defendant, Johnson agreed to treat the sending of a notice "as an act of courtesy only." But whether it is considered an act of courtesy or a wise and proper precautionary measure, such as every careful lawyer would advise, or a mere matter of convenience, in view of the multiplicity of the defendant's policy-holders and the variety of its policy contracts, the important fact remains that notice was sent, and that as sent it conformed in substance and form, in time and manner of sending, to the notice spoken of in the New York laws. So that if the notice law has anything to do with the case the decision of the Iowa

court was right, just the same, and ought not to be disturbed.

Whether, therefore, this contract be construed, as the Iowa court construed it, to be a non-forfeitable policy, which in case of non-payment of premium could not be avoided, but would stand as a valid contract of insurance for a specific term, or whether it be construed as a special form of policy, to which it was not intended the New York notice law should apply, and in which the agreement of waiver of notice that the parties made would be valid and binding, or whether it be treated as a forfeitable life contract, existing at any and all events until it should become a valid claim by death, unless sooner forfeited for non-payment of premium after sending the statutory notice, in any one of these views the result here is the same—when Johnson died he had no policy with the defendant.

Respectfully submitted.

GEORGE W. HUBBELL,
JAMES H. MCINTOSH,
FREDERIC D. MCKENNEY,
Attorneys for Defendant in Error.

30 OCTOBER, 1902.

11052

Supreme Court of the United States.

No. 87.—October Term, 1902.

Jane Johnson, Plaintiff in Error, vs. The New York Life Insurance Company. } In error to the Supreme Court of the State of Iowa.

[January 5, 1903.]

This was an action upon a policy of insurance upon the life of Frank C. Johnson, dated December 27, 1890, whereby the defendant insured his life in the sum of $25,000 for the benefit of his executors, administrators or assigns. This policy was assigned to the plaintiff in 1895, and on September 28, 1896, Johnson died. The annual premium was fixed at $1,060, payable in advance on November 11 of each year. There was the usual provision for forfeiture in case of non-payment of premiums. The premium was paid on November 11, 1892, but no payments were made thereafter. After Johnson's death, and on February 20, 1897, plaintiff tendered the past due premiums with interest thereon, which defendant refused to accept, and this action was begun.

The insurance company was incorporated under the laws of the State of New York, the policy was issued in that State, and the application contained an agreement that the contract contained in such policy and in the application should be construed according to the laws of the State of New York—the place of said contract being agreed to be the home office of the company in the city of New York.

Plaintiff, in reply to the defense of non-payment of premiums, relied upon the statute of 1877 of the State of New York, which we have heretofore had occasion to consider in several cases, and which provided that "no life insurance company doing business in the State of New York shall have power to declare *forfeited or lapsed* any policy hereafter issued or renewed, by reason of non payment of any annual premium or interest, or any portion thereof," except upon a written notice to the insured stating the amount of the premium due on the policy, the place where it should be paid, and the person to whom the same was payable, with the further proviso that "no such policy shall in any case be forfeited . . . or lapsed, until the expiration of thirty days after the mailing of said notice."

There was, however, in the State of New York another statute, commonly known as the net reserve law, giving to holders of life insurance which had been in force three full years the benefit of the net reserve on

their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default.

The policy in question contained a stipulation that "if this policy shall lapse, or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums, . . . a paid-up policy will be issued, on demand made, within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums . . . for such an amount as the net reserve on this policy at the time of lapse, computed by the American table of mortality, and interest at 4½ per cent, after deducting all indebtedness to the company, will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse."

On December 10, 1892, about two years after the policy was issued, Johnson requested the defendant, in writing, to extend to his policy "the benefits of its accumulation policy." In reply, the company issued a policy or certificate, extending to his policy the benefits of the accumulation policy plan, and providing that "after this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter to the company of any indebtedness to the company on account of this policy: 1, the insurance will be extended for the face amount, as provided in the table below: or, 2, on demand made within six months after such non-payment of such premium dues with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or, 3, the policy will be reinstated within the said six months upon payment of the overdue premium, with interest at the rate of five per cent per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing." By the "table" above mentioned it was provided that if the premiums were paid to November 11, 1893, the insurance would be extended to May 11, 1896.

In this connection the company insisted that the thirty days' notice law of New York had no application to the contract involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died.

Construing the certificate which extended to the original policy the benefits of the accumulation policy plan of the company, the Supreme Court held "that the clause of the original policy providing for its forfeiture for the non-payment of premiums was so far modified and changed that upon such failure, the policy became a paid-up contract for the amount of the original insurance for a certain and definite time. On demand of the assured within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture

of Johnson's life contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11, 1893, "became transmuted into a paid-up policy for a term ending May 11, 1896. . . . The benefits of that statute" (for thirty days' notice) "were given only to policies which had *lapsed or been forfeited* for non-payment of premium, debt or interest; and the notice had to be given, to effect this forfeiture or fix such lapse. After the default the life contract continued in force until it was determined according to the statute. . . . In the case at bar, under the modified contract, immediately on default in payment of the premium of 1893, the policy became a paid-up contract for a term; and, if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force. It went into effect by reason of the contract. . . . Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy without any further payment being required of her. . . . The notice is required only when it is sought to declare the contract *forfeited or lapsed*. Our conclusion is that this was a policy for a term that expired before Johnson's death, and therefore plaintiff had no right of recovery." (109 Iowa, 708.)

Mr. Justice BROWN delivered the opinion of the Court.

This case must be dismissed for two reasons.

1. Plaintiff relies for a reversal upon the fact that full faith and credit was not given to the law of the State of New York requiring a notice of thirty days before the forfeiture of any insurance policy, which was pleaded in the case. This however is a title, right, privilege or immunity claimed under the Constitution of the United States, within the third clause of R. S. sec. 709, which must be "specially set up and claimed" by the party seeking to take advantage of it. Conceding that it was unnecessary to set it up in any pleading anterior to the trial, since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State. In neither does it appear, nor is there any allusion to it in the opinion of the Supreme Court. It first appears in the petition for a writ of error from this court. This is clearly insufficient.

2. The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully considered, and the decision of the State courts of New York were called to its attention and cited in its opinion. The court held that notice is required by that statute only as a basis for declaring a forfeiture or lapse of a policy for non-payment of

premium or interest, and that the law had no application, because it was a non-forfeitable policy of term insurance, which had expired by limitation before the insured died. Whether the Supreme Court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer* v. *New York Life Insurance Co.*, (178 U. S. 402,) and in principle by *Glenn* v. *Garth*, (147 U. S. 360;) *Lloyd* v. *Matthews*, (155 U. S. 222.) To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another State had been construed to his detriment.

The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. (*Commercial Bank* v. *Buckingham*, 5 How. 317; *Baltimore &c. R. R. Co.* v. *Hopkins*, 130 U. S. 210.)

The writ of error is *Dismissed.*

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.